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THE
LAW AND PRACTICE
APPERTAINING TO
ORIGINATING SUMMONS,
WITH FORMS.

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PREFACE.

HAVING regard to the number and importance of the applications now made to the Chancery Division of the court by Originating Summons, it has been thought that a separate treatise on that branch of the law would be acceptable to the Profession.

As the subject is essentially one in which the practitioner must often resort to the Rules of the Supreme Court bearing thereon, the method adopted in the present work is mainly that of annotation, though separate chapters on certain portions of the subject are also given.

Part I. deals with Originating Summonses generally, including Order LV. Part II. comprises the statutory jurisdiction other than that referred to in Order LV., rule 2, and treats of Originating Summonses under the Vendor and Purchaser Act, 1874, the Conveyancing Act, 1881, the Settled Land Acts, the Married Women's Property Act, &c. Appendices I. and II. contain a few rules and forms which could not conveniently be inserted in the body of the book, and Appendix III. contains the authors' forms of Originating Summons, affidavits, statements of facts, &c.

As the law stands at present, sometimes the procedure by Originating Summons is found to be inapplicable because a question arises upon the will or settlement

with reference to a *legal* devise, or some claim is made by a person whose rights are adverse to the trust. It would clearly be convenient, in order to save expense and to avoid multiplicity of actions, if questions relating to legal devises were capable of being determined on Originating Summons. Moreover, if persons claiming adversely could be bound by consent, this would render the present jurisdiction by Originating Summons more complete. Further, it is submitted that there is no good reason why such jurisdiction should not be extended to all cases of contract, where the question between the parties depends on the construction of a written document—subject, of course, to the power in the court or judge to order the action to be carried on with pleadings or otherwise. The great advantage of proceeding by Originating Summons is, that the suitor gets his cause early before the judge at a comparatively small expense, and thus one of the principal objects of legislation, namely, the cheap and speedy administration of justice, is attained.

The authors tender their ample acknowledgments to Daniell's Chancery Practice (6th edit., by Messrs. Leonard Field, Edward Clennell Dunn, Theodore Ribton, and William Henry Upjohn), and to Daniell's Chancery Forms (4th edit., by Mr. Charles Burney), and also to the other learned authors whose books are referred to from time to time throughout the work. The authors have also to thank an eminent authority on Chancery practice for several valuable hints with regard to the forms, and also those gentlemen who have kindly lent them papers.

Mr. William N. A. Daniel, of New Inn, a gentleman of considerable experience in the practice in Chancery chambers, has kindly furnished nearly the whole of Chapter III.

The authors' forms, which with slight alteration have been used in actual practice (*a*), are concrete. This it is thought will render them more useful to the young practitioner, and not less so to the experienced one, than a mere outline. Where there is no authors' form and one is contained in Daniell's Forms, a reference thereto is given.

The subject of Originating Summons is one which has been of gradual but recently of vigorous growth. It is a difficult one to present as a whole, and the authors can only hope that this attempt to do so may prove useful.

G. N. M.

J. T. D.

Lincoln's Inn, 27th July, 1889.

(*a*) Except Forms 63, 75, and 76.

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ADDENDA.

Page 84.—*Re Medland ; Eland v. Medland* is now reported on appeal in 41 Ch. Div. 476, and 60 L. T. Rep. N. S. 851.

Pages 96 and 121.—Rule 13a is annulled by R. S. C., June, 1889 (published in W. N. 29, June, 1889, *Supp.*), and the following rule is substituted for it:—

ORDER LV., Rule 13A.

1. In all cases in which the court has jurisdiction to appoint new trustees upon petition, an application may be made to a judge in chambers by summons, and thereupon new trustees may be appointed: *and by the same or by any subsequent orders to be made on the same or any other summons for the purpose, such vesting and other consequential orders may be made as the court has jurisdiction to make upon petition for the appointment of new trustees.* Every such summons shall be intituled in the same manner as the petition *seeking the like relief* ought to have been, and shall be served upon the same persons upon whom the petition ought to have been served.

The material new portion of the rule is here given in italics. The effect is to declare that vesting orders may be made on summons in connection with appointments of new trustees. This follows the practice in *Re Morris's Settlement*, cited at p. 121, *post*. It was held in *Re Peach's Settlement* (87 L. T. 185) that where a new trustee had been appointed out of court, the court could not make a vesting order otherwise than on petition or motion in an action.

Page 99.—Rule 15a is annulled by R. S. C., June, 1889, and the following rule is substituted for it.

ORDER LV., Rule 15A.

2. No order *appointing a new trustee, or for general administration, or for the execution of a trust, or for accounts or inquiries concerning the property of a deceased person or other property held upon any trust or concerning the parties entitled thereto, and no vesting or other order consequential on the appointment of new trustees,* shall be made except by the judge in person.

The new portion of the rule is given in italics.

Page 146.—As to time for motion before judge in court to discharge order on further consideration made in chambers, see *Re Johnson ; The Manchester and Liverpool District Banking Company* (W. N., Aug. 10, 1889, p. 162; 87 L. T. 273).

Page 161.—The court has jurisdiction, on an O. S. under Order LV., r. 3, to order costs to be paid out of the estate, although all the beneficiaries were not served (*Re Medland ; Eland v. Medland*, 41 Ch. Div. 476; 60 L. T. Rep. N. S. 851).

Page 166.—Order LXV. The words in square brackets in rule 18, p. 166, *post*, were annulled, but reinstated by R. S. C., June, 1889.

Page 166.—Rule 19*b* is annulled and re-enacted in the same words.

Page 166.—Rule 19*c* is annulled, and the following rule substituted. The new portion is indicated by italics, and there are also some verbal variations.

ORDER LXV., Rule 19*c*.

5. The solicitor having the carriage of the order shall leave at the office of the proper taxing officer within seven days (*or such further time as the taxing officer may allow for reasons to be certified by him*), after the order was signed entered or otherwise perfected, a copy of it and (annexed to such copy) a statement containing the names and addresses of the parties appearing in person, and of the solicitors of the parties not appearing in person, and in case of default no costs of *drawing and copying the bill, nor of attending* the taxation, shall be allowed to the solicitor so failing.

Page 167.—Rule 19*d* is annulled, but re-enacted in the same words.

Page 168.—Rule 27*A*, Reg. 38 (*a*) and (*b*) are annulled, and the following substituted:

ORDER LXV., Rule 27. Regulation 38*A*.

8. If in any case in which a taxation is directed with a view to the payment of the costs out of a fund or estate (real or personal), or out of the assets of a company in liquidation, the costs shall have been increased by unnecessary delay or by improper, vexatious, or unnecessary proceedings, or by other misconduct or negligence, or if from any other cause the amount of the costs shall be excessive having regard to the value of the fund, estate, or assets to which they relate, or other circumstances, the taxing officer shall allow only such an amount of costs as would have been incurred if the litigation had been properly conducted, and shall assess the same at a gross sum, and shall (if necessary) apportion the amount among the parties. *The provisions as to the review of taxations shall apply to allowances and certificates under this rule.*

It will be observed that the words referring to the opinion of the taxing master (*post*, p. 169) are omitted, and that the words in italics are new. These changes are favourable to the solicitor.

ORDER LXV., Rule 27. Regulation 38*B*.

9. If on the taxation of a bill of costs payable out of a fund or estate (real or personal), or out of the assets of a company in liquidation, the amount of the professional charges (*a*) contained in the bill is reduced by a sixth part, no costs shall be allowed to the solicitor leaving the bill for taxation for drawing and copying it, nor for attending the taxation.

The R. S. C., May, 1889, are annulled by the R. S. C., June, 1889.

Page 174.—The 163*rd* *Starr Bowkett B. B. S. and Siban's Contract* is now fully reported in 60 L. T. Rep. N. S. 811. The case was affirmed by the Court of Appeal, on July 30 (87 L. T. 272; W. N. 1889, p. 157.)

(*a*) The words "exclusive of disbursements" (*post*, p. 169) are here omitted.

Page 189, line 10, for "488" read "211."

Page 191, line 10, after "gives" insert "a tenant for life."

Pages 202, 224.—*Cardigan v. Curzon Howe* (C. A.) is now also reported in 60 L. T. Rep. N. S. 723.

Page 256.—*Axford v. Reid* (C. A.) is now also reported in 60 L. T. Rep. N. S. 726.

Page 309.—It was here stated that some new trade mark rules were expected shortly to appear. They will be found in W. N., Aug. 3, 1889, Supp. p. 360, and 87 L. T. 279. Besides other alterations new rules are substituted for T. M. Rules 29, 30. Four clear day's notice of every application to the court under sect. 90 of the Patents, &c., Act, 1883, for rectification of the register of trade marks, shall be given to the Comptroller (r. 46a).

ORIGINATING SUMMONS.

PART I.

CHAPTER I.

INTRODUCTORY.

THE following extract from the judgment of Mr. Justice Chitty, in the case of *Re Busfield; Whaley v. Busfield* (54 L. T. Rep. N. S. 220; 32 Ch. Div. 125; 55 L. J. 467, Ch.; 34 W. R. 372) forms a fitting introduction to the subject of the present work.

“An Originating Summons first arose under 15 & 16 *Origin. Vict.* c. 86, s. 45, and was confined to the simple case of an order for the administration of the personal estate of a dead man. This provision was left untouched until the Orders of 1883 were issued, which for the first time dealt with the Chancery Consolidated Orders of 1860 as a whole.

“An Originating Summons is now issued under Order *Order LV.* LV. of the Rules of 1883. This order has greatly enlarged the scope of an Originating Summons, and made it applicable to new subjects, as, for instance, the execution of trusts. By the Orders of December, 1885, the scope has been still further extended. The main difference between a writ of summons and an Originating summons is, that in the one case the proceedings are in court, and there are or may be pleadings, whereas in the

other case the proceedings are in chambers, and there are no pleadings."

Statutes.

It should be added that during the period which elapsed between the passing of 15 & 16 Vict. c. 86 (1852), and the Rules of 1883, numerous statutes were passed, authorising the decision of various questions in a summary way, under which proceedings were originated by a summons which may be styled an Originating Summons.

As examples of such statutes we may mention the Vendor and Purchaser Act, 1874, the Conveyancing Act, 1881, and the Married Women's Property Acts, 1870 (sect. 9) and 1882 (sect. 17).

Jurisdiction.

It would seem that, except under a statute or rule, there is no jurisdiction to dispose of matters by Originating Summons (*see* Order LV., r. 2); so that it is necessary, before commencing proceedings by this form of process, to consider whether there is a statute or rule giving authority for the purpose.

Lands Clauses Act.

In *Ex parte Mayor of London* (49 L. T.Rep. N. S. 437 25 Ch. Div. 384; 53 L. J. 6, Ch.; 32 W. R. 87) an endeavour was made to show that rule 2 (7) of Order LV., which orders certain applications under the Lands Clauses Consolidation Act, 1845, to be disposed of in chambers by the judges of the Chancery Division, was *ultra vires*, as the L. C. C. Act itself expressly directs a petition to be presented. The power of making the rules was very fully discussed, and it was held that the sub-rule in question was valid.

Definition of Originating Summons.

By sect. 100 of the Judicature Act, 1873 (36 & 37 Vict. c. 66) "action" is defined as meaning (unless there is anything in the subject or context repugnant thereto), in the construction of that Act, "a civil proceeding commenced by writ, or in such other manner as may be prescribed by rules of court, and shall not include a criminal proceeding by the Crown."

And by Order LXXI., r. 1, the provisions of the above section of the Judicature Act are made applicable to the rules, and "Originating Summons" is declared to mean (unless there is anything in the subject or context repugnant thereto) "a summons by which proceedings are commenced without writ."

Accordingly it was held by the Court of Appeal, in *Re Fawsitt; Galland v. Burton* (53 L. T. Rep. N. S. 271; 30 Ch. Div. 231; 54 L. J. 1131, Ch.; 34 W. R. 26), that an Originating Summons taken out under Order LV., r. 3, is "a civil proceeding commenced otherwise than by writ in manner prescribed by a rule of court," and is consequently an action within the meaning of sect. 100 of the Judicature Act, 1873; and that therefore an order made upon such a summons is appealable at any time within one year from its date, and that the appeal must not be brought within twenty-one days under Order LVIII., r. 15.

This decision seems to apply to every Originating Summons taken out under Order LV. Before the Rules of 1883 it was held that an appeal from a summons under the V. & P. Act, 1874, s. 9, must be brought within the twenty-one days, as such a summons was then "a matter not being an action" within Rules of Court, 1875, Order LVIII., r. 9: (*Re Blyth and Young*, 41 L. T. Rep. N. S. 746; 13 Ch. Div. 416; 28 W. R. 266, C. A.; Daniell's Ch. Pr. 1385.)

Note.—As to appeals from orders on summonses taken out in an administration action, see *Re Compton* (27 Ch. Div. 392; 51 L. T. Rep. N. S. 277; 33 W. R. 160).

CHAPTER II.

OUTLINE OF THE SUBJECT.

Applications
by Originat-
ing Summons.

THE words "Originating Summons" are principally suggestive of Order LV., rr. 3, 4; R. S. C. 1883, owing to the large number of such summonses taken out under those rules or one of them; but the numerous applications under rules 2 and 5 *a* of the same order, the former being principally under Acts of Parliament, and the latter relating to foreclosure and redemption, must not be overlooked. To these must be added the jurisdiction to appoint new trustees recently conferred by Order LV., r. 13 *a*, 19th Dec. 1888, *post*, p. 96, and the applications under special Acts of Parliament, such as the Vendor and Purchaser Act, 1874, the Settled Land Acts, the Married Women's Property Act, 1882, the Conveyancing Act, 1881, the County Courts Act, 1888, the Land Charges Act, 1888, the Mortmain and Charitable Uses Act, 1888, and other statutes, all of which are dealt with in the subsequent portion of this work.

Here, too, may be mentioned a summons for the advice of a judge, under sect. 30 of 22 & 23 Vict. c. 35 (*a*), but orders thereunder are usually made by petition, and it is conceived that, having regard to Order LV., r. 3 (*post*, p. 79), such applications will in future be rare. For the practice thereon see Morgan, p. 102; Dan. p. 2232; Wilson, p. 392, and for form of originating summons, see Dan. F. 2181.

The three main questions which present themselves to the mind of the practitioner in connection with Origin-

(a) See Order LV., r. 19; Wilson, 392.

nating Summonses are (1) Is that mode of proceeding applicable to the case? (2) If so, who are the proper parties to the summons? and (3) What evidence will be required in support of it? The first question will, it is believed, be readily answered from the present work, and in the index under the head of "Originating Summons" will be found a list of applications which can be made thereby.

The question of parties is fully dealt with in Chapter Parties. IV., *post*, p. 13.

It may be well here to state that the court has no general power to dispense with service on persons interested, or to appoint anyone to represent them; or at least if it has such power it is not in the habit of exercising it. In disposing of matters in the absence of parties the court usually acts in pursuance of some order or Act applicable to the circumstances of the case.

Evidence is treated of in Chapter V., *post*, p. 27. Evidence.

As to service of an Originating Summons see Order Service. LIV., r. 4, *post*, p. 49, and as to proceedings to be taken, if it is not served within seven clear days before the return thereof, see Order LV., r. 22, *post*, p. 103.

As to amendment of an originating summons see Amendment. Chapter III., *post*, p. 10, and Order LIV., r. 3, *post*, p. 49.

The hearing of any application (including, of course, Adjournment. an originating summons) may be adjourned from time to time upon such terms as the court or judge shall think fit: (See Order LII., r. 7; Wilson, p. 389.) As to adjournments from chambers into court see Order LIV., r. 9, *post*, p. 51.

Causes or matters may be transferred from one judge Transfers and to another of the Chancery Division by an order of the consolidation. Lord Chancellor. (b)

In a memorandum dated 10th Nov., 1875, set out at L. Rep. 1 Ch. Div. 41, the practice is thus stated by Lord Justice James: "The Lord Chancellor would direct the transfer of any action on a written application to his secretary, accompanied by the written consent of all parties. Where all parties did not consent the application must be made to the Lord Chancellor in court."

As to an Originating Summons being an action, see *ante*, p. 3.

A particular application in any cause or matter may by the direction of the Lord Chancellor be heard and disposed of by any judge of the High Court who shall consent so to do, to whatever division or judge such cause or matter may have been assigned: (Order XLIX., r. 4; Wilson, p. 369.)

Any judge of the Chancery Division may, at the request or with the consent of any other judge of that division before whom a cause or matter is pending, hear such cause or matter, or any application therein, and for that purpose it shall not be necessary that any order for transfer shall be made or consent of the parties obtained: (Order XLIX., r. 4*a*; Wilson, p. 369.)

When an order has been made by any judge of the Chancery Division for the administration of the assets of any testator or intestate, the judge in whose court such administration shall be pending has power to order the transfer to such judge of any cause or matter pending in any other court or division brought or continued by or against the executors or administrators of the testator or intestate whose assets are being so administered: (Order XLIX., r. 5; Wilson, p. 370.)

The application for transfer may be made *ex parte*: (see *Re Sharpe*; *Scott v. Sharpe*, W. N. 1884, p. 28; and see Wilson, p. 370.)

When any summons under Order LV., rr. 3 and 4,

has been marked with the name of a judge other than the judge by rule 11 of the same Order prescribed, such last-mentioned judge shall, unless cause shall appear to him to the contrary, without any further consent, order the transfer to such judge of the summons so improperly marked : (Order XLIX., r. 6 ; Wilson, p. 370.)

For Order LV., r. 11, see *post*, p. 95.

Causes or matters pending in the same division may Consolidation. be consolidated by order of the court or a judge in the manner in use before the commencement of the Judicature Act, 1873, in the Superior Courts of Common Law : (Order XLIX., r. 8 ; Wilson, p. 370.)

As to the passing of the Order, see Chapter III., Order. *post*, p. 12.

As to service of the Order, see Chapter XV., *post*, and as to "Time" generally see Chapter XIII., *post*. Time.

As to costs, see Chapter XIV., *post*. Cost

The Order of the Court or judge upon Originating Appeals. Summons is subject to appeal. As to appeals from chambers, see Chapter XII., Part I., *post*. As to appeals from orders made in court see same Chapter, Part II., *post*, and as to appeals to the House of Lords, see same Chapter, *post*.

CHAPTER III.

CONCISE VIEW OF THE PRACTICE BEFORE
THE JUDGE OR CHIEF CLERK.

Issuing the
summons.

AN Originating Summons is prepared on Judicature paper (foolscap). Skeleton forms can be procured at the Law Courts or from a Law stationer.

Certificate of
no prior
application.

For the purpose of issuing the summons, two copies are required, one of which must be impressed with a ten shilling stamp. (a) The two copies are then presented at the Writ Department in the Central Office of the Royal Courts of Justice. The stamped copy is retained and the other one is returned to the solicitor, sealed and marked with the reference number and the name of the judge to whom the matter is assigned. The summons has then to be taken to the chambers of the judge and a copy lodged with the chief clerk, who will give an appointment to hear the application. At the same time (where the application is under Order LV. r. 21, *post* p. 103) a certificate (form of which can be obtained at the Law Courts) signed by the solicitor himself or by a member of his firm, that no prior application has been made to effect the same object, and that the proceedings have no connection with any other cause or matter, has to be lodged at the judge's chambers. (b)

The return of the appointment on the summons is regulated by Order LIV. r. 4. (c).

Service of
summons.

The summons is served by giving a true copy to the

(a) See order as to Supreme Court fees, 1884, Appendix I., *post*.

(b) For form of such certificate, see Appendix II., *post*.

(c) See *post*, p. 49.

respondent, the original being produced at the same time. (a).

Before any respondent can be heard upon the summons Appearance. he must have entered an appearance and given notice thereof, in accordance with Order LV., r. 23 (b).

The appearance is entered in the Appearance Department of the Central Office in the manner and form prescribed by Order XII. rr. 8 to 13 (c). A fee of two shillings is paid on entering appearance for any respondent (d).

Due notice should be given to the respondent or his Notice to produce. solicitor to produce any documents, such as a probate, letters of administration, or settlement, which may be required at the hearing.

On the return of the summons the chief clerk of the Return of summons. judge will enter the evidence adduced in support of the application, and any that may be filed in answer or opposition thereto, and will, if necessary, appoint a time Closing evidence. for closing the evidence.

When the evidence is deemed completed, the chief Hearing. clerk will either deal with the application himself (unless it is one which must necessarily go before the judge) or when he has satisfied himself that the proceedings are right for the judge, will adjourn the matter either to the judge in chambers or into court, according to the importance of the subject and the circumstances of the case. If the matter be adjourned to the judge in chambers, the parties must state whether or not the application will be attended by counsel. The judge's Counsel. list must then be watched by the parties or their solicitors as in some of the judges' chambers no further intimation is given when the matter will be heard. If counsel attend, proper briefs must be delivered.

(a) See further as to service, *post*, p. 50.

(b) See *post*, p. 103.

(c) See Wilson, p. 158.

(d) See order as to Supreme Court fees, 1884, *post*.

Statement of
facts.

Some of the judges (Mr. Justice Chitty for instance) require, upon the adjournment to them, a short statement of the facts of the case to be lodged in chambers by the applicant's solicitor. This can be copied on judicature paper. Sometimes it is printed, and when a number of copies are required this is believed to be as cheap as copying. For forms of such statement of fact see Appendix III., *post*.

Amendment
of summons.

It not infrequently happens that a summons requires amendment, for which purpose, if after service, leave must be obtained from the chief clerk or judge as the case may be. A formal order is not usually necessary. Leave having been obtained, the applicant's solicitor will amend his original summons—for convenience, this is generally done in red ink—and also the chief clerk's copy, and will obtain from him his fiat, authorising the official at the Writ Department to seal the amendments. On this fiat a fee of three shillings is paid by adhesive stamp. (a) The summons is then taken to the Writ Department, and the amendments are sealed, a proper *præcipe* (form of which can be obtained at the Law Courts) being left, on which a fee of five shillings by adhesive stamp is paid (b).

The amended summons is then served on the respondent, or if an appearance has been entered through a solicitor then on the solicitor.

Any amendment or alteration to be made before service in an Originating Summons in the Chancery Division must, according to the Central Office Rules, 1884 (Wilson, p. 707 and Annual Prac. 1091), be made on the fiat of a master, and before procuring such fiat the *præcipe* for the amendment or alteration must be initialed by the chief clerk, but as a matter of practice

(a) See order as to Supreme Court fees, 1884. Appendix I., *post*.

(b) Order as to Supreme Court fees, 1884. *post*.

the chief clerk's fiat alone is sufficient to authorise such amendment.

Should the matter be adjourned into court the applicant's solicitor should take the summons to the official having charge of the lists and satisfy himself by inspection of the cause-book that the summons has been set down, or if not, what further is required to effect that object.

Adjournment
into court.

If the matter is decided by the chief clerk or by the judge in chambers the summons will be left with the chief clerk, together with the evidence and other papers which he may require, who will indorse a memorandum on the summons of the order made, and this must be taken by the applicant's solicitor, or the solicitor of the party having the conduct of the order, as the case may be, to the proper registrar of the day who is indicated in the endorsement to bespeak the draft of the order.

Drawing up
order made in
chambers.

If, however, the order is made by the judge in court, the solicitor who draws it up will lodge his counsel's brief with the evidence and other necessary papers with the registrar of the day on which the order was pronounced. The draft order is usually issued in the course of two or three days.

Drawing up
order made in
court.

If the order is one of any difficulty or upon which any question or dispute arises an appointment can be obtained before the registrar, of which due notice must be given by the party obtaining it; and upon such appointment the draft will be settled. If no question or difficulty arises the parties can meet at the registrar's and approve the draft by signing their names upon it. It is then left with the registrar who, if there are dealings with any fund in court, or on which the paymaster has to act, will prepare and issue a proof print, which must be settled and approved by the parties in the same way as the draft order. The proof print is then left with the registrar who, in two days, will issue the fair print, which is

Fund in court.

examined by the solicitor of the party having the conduct of the order, and after being properly stamped is left by him with the registrar to be passed and entered. If no printed order is necessary the registrar will issue the engrossment in a couple of days to the solicitor of the party having the conduct of the order, who will give notice of an appointment to pass. This is usually done by the solicitors of the parties meeting at the registrar's chambers, and signing the order which, when properly stamped, is left with the registrar who will pass and enter it, and in two days it can be obtained from him completed.

By order as to Supreme Court Funds, 1884, *post*, the stamp, on entering an order made on the hearing of an Originating Summons, unless otherwise provided, is ten shillings.

CHAPTER IV.

PARTIES.

As already stated, *ante*, p. 3, an Originating Summons under Order LV., r. 3, is an action within the meaning of that word in sect. 100 of the Judicature Act, 1873; and as a rule (subject to express provisions in particular cases, as for instance under Order LV., r. 3, *post*, p. 79) the R. S. C. 1883, as to parties as well as the principles of law applicable thereto, will apply to parties to an Originating Summons, but some special rules on this head are laid down by Order LV., r. 5, *post*, p. 87, as to summonses taken out under rr. 3, 4, of that Order (which see).

General rule
as to parties.

Apart from all technicalities two main points are to be borne in mind: (1) that no man's rights ought to be adjudicated upon behind his back, and (2) that the court is unwilling to decide questions between some only of the parties interested, as a decision so given would be no bar to future litigation on the same point between the others: (see Mitford (Lord Redesdale) on Pleadings, 5th edit., by J. W. Smith, p. 190; and for a valuable note on parties under the old law prior to 1847, see p. 398, *et seq.*, of that work. For a discussion of the subject generally, see Dan. 194-306.)

The Judicature Acts and rules thereunder have rendered the question of parties less important than formerly, but it is still not infrequently a perplexing one especially to the young practitioner.

The practice on the subject as regards Originating Summons can hardly be considered as settled. As most of the rules of Order XVI., have some bearing on the

matter, it has been thought better to print the whole of the Order (except the rules as to third party procedure), although some of such rules obviously do not relate to Originating Summons. The rules most in point are, (8) "Trustees," *post*, p. 15; (9) "Numerous persons," *post*, p. 16; and (32) "Class unknown or difficult to ascertain," *post*, p. 22.

ORDER XVI.—(R. S. C. 1883.) (a)

Parties.

1. Generally.

Joinder of
plaintiffs.

1. All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person who shall not be found entitled to relief, unless the court or a judge in disposing of the costs shall otherwise direct.

Wrong plain-
tiff.

2. Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the Court or a judge may, if satisfied that it has been so commenced through a *bonâ fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as may be just.

See *Besley v. Besley* (37 Ch. Div. 648; 58 L. T. Rep. N. S. 510; 57 L. J. 464, Ch.; 36 W. R. 604); and *Ayscough v. Bullar* (W. N., 1889, p. 81).

(a) For valuable annotations on the rules under this order, see Wilson, p. 172, *et seq.*; and Annual Prac., p. 264, *et seq.*

3. Where in an action any person has been improperly or unnecessarily joined as a co-plaintiff, and a defendant has set up a counterclaim or set-off, he may obtain the benefit thereof by establishing his set-off or counterclaim as against the parties other than the co-plaintiff so joined, notwithstanding the misjoinder of such plaintiff or any proceeding consequent thereon.

4. All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment. Joinder of defendants.

5. It shall not be necessary that every defendant shall be interested as to all the relief prayed for, or as to every cause of action included in any proceeding against him ; but the court or a judge may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest.

6. The plaintiff may, at his option, join as parties to the same action all or any of the persons severally, or jointly and severally liable on any one contract, including parties to bills of exchange and promissory notes. Persons severally or jointly liable.

7. Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may, in such manner as hereinafter mentioned, or as may be prescribed by any special order, join two or more defendants, to the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties. Doubt as to person liable.

8. Trustees, executors, and administrators may sue and be sued on behalf of or as representing the property or estate of which they are trustees or representatives, without joining any of the persons beneficially interested in the trust or estate, and shall be considered as represent- Trustees and executors.

ing such persons; but the court or a judge may, at any stage of the proceedings, order any of such persons to be made parties either in addition to or in lieu of the previously existing parties.

For an able note on this rule see Annual Prac. pp. 272-274. Obviously this rule can have but little application to an Originating Summons under Order LV., r. 3 (*post*, p. 79) where the trustees, executors, or administrators are plaintiffs or defendants, upon an application with reference to the internal affairs of their trust, except perhaps where the interests of unborn *cestuis que trust* have to be protected. If, however, any of the beneficiaries have settled their shares or the like, the rule would apply so as to save the necessity of joining the persons beneficially interested under the sub-settlement.

Numerous
persons.

9. Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorised by the court or a judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested.

This rule is a very useful one, and is acted upon in applications by Originating Summons. No hard-and-fast rule has been laid down as to how many persons constitute a "numerous" class. It is believed that on one occasion it was suggested from the bench that the number should not be less than ten.

Practice on
Originating
Summons.

The practice under this rule on Originating Summons varies. The most formal plan is for the plaintiff after the Originating Summons has been issued to apply by ordinary summons in the action already commenced by Originating Summons for an order authorising the defendant or defendants who are members of the numerous class to defend the action on behalf of all the persons in the same interest with themselves (see *Andrews v. Salmon*, W. N. 1888, p. 102; corrected *ib.* p. 176, which, however, was an action commenced by writ).

Sometimes an order of the kind is asked for by the Originating Summons, and the court or judge at the hearing makes the order accordingly.

Another, and perhaps the most usual mode of proceeding, is to apply for the representation order when the Originating Summons first comes before the judge or chief clerk.

In every case there should be evidence by affidavit showing that

there are numerous persons having the same interest in one cause or matter.

The form of order (according to *May v. Newton*, 56 L. T. Rep. Numerous N. S. 140; 34 Ch. Div. 349; 56 L. J. 313, Ch.; 35 W. R. 363), ^{class.} where one of a numerous class is sued as defendant is, "it appearing that the residuary legatees" (or whatever the class may be) "are numerous, and that A. is one of such class order that A. do defend in the cause" (or matter) "on behalf or for the benefit of all persons so interested."

The following extract from the instructive judgment of Mr. Justice Kay in the same case has an important bearing on this rule :

"When one of the class is plaintiff suing the trustee on behalf of all the class, it would seem, from the language of rules 9 and 40, that such an order is not absolutely necessary, because I presume the practice was considered established that one might sue on behalf of all, so as to bind the class. But, as under rule 40, the judge may direct notice of the judgment or order to be served on the others in such a case, and only those so served are bound under the terms of that rule, it seems proper, in order to bind absent parties, to obtain his direction; and if they are numerous, although represented by a plaintiff suing on their behalf, it would be better to obtain an order that the plaintiff or some other member of the class should represent them."

The court has no *general* jurisdiction to declare that the parties Absent to an action sufficiently represent absent parties. Thus, in *Re parties. Bullen-Smith; Berners v. Bullen-Smith* (57 L. T. Rep. N. S. 924; W. N. 1887, p. 231), which was an Originating Summons taken out by trustees of a will to determine the testator's domicile, he left a widow and four children, the widow and three children were parties to the summons, but the remaining child was in Calcutta. The value of the estate was large. Mr. Justice Kay held, that, though he might entertain the summons *in the absence* of such child, he could not bind him by any order. Accordingly, leave was given to serve a writ upon him, claiming a declaration as to domicile together with notice of motion. But, subsequently Mr. Justice Kay consented to hear the summons on the absent son (who was of age) being made a party to the summons, and appearing by counsel: (58 L. T. Rep. N. S. 578.)

Of course, the mere fact that a person is out of the jurisdiction is no reason why he should not be made a defendant to an Originating Summons, provided there is any solicitor in this country authorised to enter an appearance for him.

10. Subject to the provisions of the Acts and these ^{Probate actions.} rules, in all Probate actions the rules as to parties, in

use in the Court of Probate previously to the commencement of the principal Act, shall continue to be in force.

Defect of parties.

11. No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The court or the judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court or a judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added. No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent in writing thereto. Every party whose name is so added as defendant shall be served with a writ of summons or notice in manner hereinafter mentioned, or in such manner as may be prescribed by any special order, and the proceedings as against such party, shall be deemed to have begun only on the service of such writ or notice.

Adding parties.

See *Besley v. Besley* (37 Ch. Div. 648; 58 L. T. Rep. N. S. 510; 57 L. J. 464, Ch.; 36 W. R. 604); and *Byrne v. Brown* (W. N. 1889, p. 19; 86 L. T. 258).

Alteration of parties.

12. Any application to add or strike out or substitute a plaintiff or defendant may be made to the court or a judge at any time before trial by motion or summons, or at the trial of the action in a summary manner.

Adding defendant.

13. Where a defendant is added or substituted, the plaintiff shall, unless otherwise ordered by the court or a

judge, file an amended copy of and sue out a writ of summons, and serve such new defendant with such writ or notice in lieu of service thereof in the same manner as original defendants are served.

2. *Partners.*

14. Any two or more persons claiming or being ^{Partners} liable as co-partners may sue or be sued in the name of ^{suing or sued.} the respective firms, if any, of which such persons were co-partners at the time of the accruing of the cause of action; and any party to an action may in such case apply by summons to a judge for a statement of the names of the persons who were, at the time of the accruing of the cause of action, co-partners in any such firm, to be furnished in such manner, and verified on oath or other wise, as the judge may direct. Provided that, in the case of a co-partnership which has been dissolved, to the knowledge of the plaintiff, before the commencement of the action, the writ of summons shall be served upon every person sought to be made liable.

15. Any person carrying on business in the name of a ^{Apparent} firm apparently consisting of more than one person may ^{firm.} be sued in the name of such firm.

3. *Persons under Disability.*

16. Infants may sue as plaintiffs by their next friends, ^{Infants.} in the manner heretofore practised in the Chancery Division, and may, in like manner, defend by their guardians appointed for that purpose. Married women ^{Married} may sue and be sued as provided by the ^{women.} Married Women's Property Act, 1882.

As to Married Women, see cases cited in Chapter XIX., *post*.

17. Where lunatics and persons of unsound mind not ^{Lunatics.} so found by inquisition might respectively before the passing of the Principal Act have sued as plaintiffs or would have been liable to be sued as defendants in any

action or suit, they may respectively sue as plaintiffs in any action by their committee or next friend according to the practice of the Chancery Division, and may in like manner defend any action by their committees or guardians appointed for that purpose.

In *Re Pepper*; *Pepper v. Pepper* (50 L. T. Rep. N. S. 580; 53 L. J. 1054, Ch.; 32 W. R. 765; W. N. 1884, p. 141) it was decided that the rules as to service of writs on persons of unsound mind not so found applied to originating summons.

Appearance
of infants.

18. An infant shall not enter an appearance except by his guardian *ad litem*. No order for the appointment of such guardian shall be necessary, but the solicitor applying to enter such appearance, shall make and file an affidavit in the form No. 8 in Appendix A., Part II., with such variations as circumstances may require.

For Form, see Appendix II., *post*.

19. Every infant served with a petition or notice of motion, or summons in a matter, shall appear on the hearing thereof by a guardian *ad litem* in all cases in which the appointment of a special guardian is not provided for. No order for the appointment of such guardian shall be necessary, but the solicitor by whom he appears shall previously make and file an affidavit as in the last rule mentioned.

Next friend,
&c.

20. Before the name of any person shall be used in any action as next friend of any infant, or other party, or as relator, such person shall sign a written authority to the solicitor for that purpose, and the authority shall be filed in the central office, or in the district registry if the cause or matter is proceeding therein.

Consent by
person under
disability.

21. In all causes or matters to which any infant or person of unsound mind, whether so found by inquisition or not, or person under any other disability, is a party, any consent as to the mode of taking evidence or as to any other procedure shall, if given with the consent

of the court or a judge by the next friend, guardian, committee, or other person acting on behalf of the person under disability, have the same force and effect as if such party were under no disability and had given such consent. Provided that no such consent by any committee of a lunatic shall be valid as between him and the lunatic unless given with the sanction of the Lord Chancellor or Lords Justices sitting in Lunacy.

4. *Proceedings by or against Paupers.*

22. Any person may be admitted in the manner here- Pauper
tofore accustomed to sue or defend as a pauper on proof that he is not worth 25*l.*, his wearing apparel and the subject-matter of the cause or matter only excepted.

23. A person desirous of suing as a pauper shall lay a Counsel's
case before counsel for his opinion whether or not he has opinion.
reasonable grounds for proceeding.

24. No person shall be permitted to sue as a pauper unless the case laid before counsel for his opinion, and his opinion thereon, with an affidavit of the party, or his solicitor, that the case contains a full and true statement of all the material facts to the best of his knowledge and belief, shall be produced before the court or judge or proper officer to whom the application is made, and no fee shall be payable by a pauper to his counsel or solicitor.

25. A person admitted to sue or defend as a pauper No court fees.
shall not be liable to any court fee.

26. Where a person is admitted to sue or defend as a Assignment
pauper the court or a judge may, if necessary, assign a of counsel
counsel or solicitor, or both, to assist him, and a counsel and solicitor.
or solicitor so assigned shall not be at liberty to refuse his assistance unless he satisfies the court or judge that he has some good reason for refusing.

27. Whilst a person sues or-defends as a pauper No fees.
person shall take, or agree to take, or seek to obtain

from him any fee, profit, or reward, for the conduct of his business in the court, and any person who takes, or agrees to take, or seeks to obtain any such fee, profit, or reward shall be guilty of a contempt of court.

28. If any person admitted to sue or defend as a pauper gives, or agrees to give, any such fee, profit, or reward, he shall be forthwith dispaupered, and shall not be admitted again in the same case until it was or deferred to the next term.

Signature of
solicitor.

29. No writ of motion shall be served on any person admitted to sue or defend as a pauper until a petition shall be presented, or except by any person admitted to sue or defend as a pauper for the discharge of his solicitor, unless it is applied for by his solicitor.

Solicitor's
duty.

30. It shall be the duty of the solicitor assigned to a person admitted to sue or defend as a pauper to take care that no writ is served, or summons issued, or petition presented, without good cause.

Costs.

31. Costs ordered to be paid to a person admitted to sue or defend as a pauper shall, unless the court or a judge shall otherwise direct, be taxed as in other cases.

5. Administration and Execution of Trusts.

Heir, next of
kin, class—
Person
appointed to
represent.

32. In any case in which the right of an heir-at-law or the next of kin or a class shall depend upon the construction which the court or a judge may put upon an instrument, and it shall not be known or shall be difficult to ascertain who is or are such heir-at-law or next of kin or class, and the court or judge shall consider that in order to save expense or for some other reason it will be convenient to have the questions of construction determined before such heir-at-law, next of kin, or class shall have been ascertained by means of inquiry or otherwise, the court or judge may appoint some one or more persons to represent such heir-at-law, next of kin,

or class, and the judgment of the court or judge in the presence of such persons shall be binding upon the heir-under of kin, or class so represented.

if such observed that this rule only applies where the class are such com. or it is difficult to ascertain them.

committe. e under this rule will be the same as under rule 9.

and the f summons, see Dan. F. 139.

Lord Ch f order, see Appendix III., *post*.

could not be applied if all the mgs of the class ned (see *Re Gardiner*; *Jones*, W. N.

but it is apprehended that unless *summers*. if such

22. An en ascertained by judicial inquiry or by *summers*. lence not precluded from acting under this rule.

tofore acc that he i residuary legatee or next of kin entitled to a Administration order.

subject r order for the administration of the personal of deceased person, may have the same without serving the remaining residuary legatees or next of kin.

See *May v. Newton*, *supra*, p. 17.

34. Any legatee interested in a leg. charged upon real estate, and any person interested in the proceeds of real estate directed to be sold, and who may be entitled to a judgment or order for the administration of the estate of a deceased person, may have the same without serving any other legatee or person interested in the proceeds of the estate.

35. Any residuary devisee or heir entitled to the like judgment or order, may have the same without serving any co-residuary devisee or co-heir.

36. Any one of several *cestuis que trust* under any deed or instrument entitled to a judgment or order for the execution of the trusts of the deed or instrument, may have the same without serving any other *cestui que trust*. Order for execution of trusts.

37. In all cases of actions for the prevention of waste or otherwise for the protection of property, one person may sue on behalf of himself and all persons having the same interest. Protection of property.

Administra-
tion order.

38. Any executor, administrator, or trustee entitled thereto may have a judgment or order against any one legatee, next of kin, or *cestui que trust* for the administration of the estate or the execution of the trusts.

In suits in equity only those who have proved the will need sue (*see Williams on Executors*, 8th edit., p. 1920); and only those who have acted need be sued (*ib.* 2021); and see *Annual Pract.* p. 273.

Court may
add parties.

39. The court or a judge may require any person to be made a party to any action or proceeding, and may give the conduct of the action or proceeding to such person as he may think fit, and may make such order in any particular case as he may think just for placing the defendant on the record on the same footing in regard to costs as other parties having a common interest with him in the matters in question.

Notice of
order to bind
persons.

40. Wherever, in any action for the administration of the estate of a deceased person or the execution of the trusts of any deed or instrument, or for the partition or sale of any hereditaments, a judgment or an order has been pronounced or made—

(a.) Under Order XV. ;

(b.) Under Order XXXIII. ;

(c.) Affecting the rights or interests of persons not parties to the action ;

the court or a judge may direct that any person interested in the estate or under the trust or in the hereditaments, shall be served with notice of the judgment or order ; and after such notice such persons shall be bound by the proceedings in the same manner as if they had originally been made parties, and shall be at liberty to attend the proceedings under the judgment or order. Any person so served may, within one month after such service, apply to the court or judge to discharge, vary, or add to the judgment or order.

See *May v. Newton*, *ante*, p. 17 ; *Re Wicks* ; *Wicks v. Wicks* W. N. (88), 9.

41. It shall not be necessary for any person served with notice of any judgment or order, to obtain an order for liberty to attend the proceedings under such judgment or order, but such person shall be at liberty to attend the proceedings upon entering an appearance in the Central Office in the same manner, and subject to the same provisions, as a defendant entering an appearance.

Person served with notice may attend.

A person attending proceedings will not be entitled to his costs of so doing unless expressly ordered: (*Sharp v. Lush*, 10 Ch. Div. 468; 48 L. J. 231, Ch.; 27 W. R. 528.) But if there is a question to be argued he will usually be allowed his costs of attending the hearing on further consideration: (*Sharp v. Lush*.)

42. A memorandum of the service upon any person of notice of the judgment or order in any action under rule 40 shall be entered in the Central Office upon due proof by affidavit of such service.

Memorandum of service.

43. Notice of a judgment or order served pursuant to rule 40 shall be entitled in the action and there shall be endorsed thereon a memorandum in the Form No. 28* in Appendix G.

Title of notice. (a)

44. Notice of a judgment or order on an infant or person of unsound mind not so found by inquisition shall be served in the same manner as a writ of summons in an action.

Infant, &c.

45. In any cause or matter to execute the trusts of a will it shall not be necessary to make the heir-at-law a party, but the plaintiff shall be at liberty to make the heir-at-law a party where he desires to have the will established against him.

Heir not a party.

46. If in any cause, matter, or other proceeding it shall appear to the court or a judge that any deceased

No personal representative.

(a) Wherever an asterisk is placed against a reference to a form in these Orders it indicates that such form has not been inserted in the present work, on the ground either that it is a form which practitioners are not in the habit of copying from the appendix to the rules or is not of sufficient general utility.

person who was interested in the matter in question has no legal personal representative, the court or judge may proceed in the absence of any person representing the estate of the deceased person, or may appoint some person to represent his estate for all the purposes of the cause, matter, or other proceeding on such notice to such persons, if any, as the court or judge shall think fit, either specially or generally by public advertisement, and the order so made, and any order consequent thereon, shall bind the estate of the deceased person in the same manner in every respect as if a duly constituted legal personal representative of the deceased had been a party to the cause, matter, or proceeding.

It is well settled that where general administration is sought, a legal personal representative of the testator or intestate in the action, duly appointed by the Probate Division, is required: (see *Dowdeswell v. Dowdeswell*, 38 L. T. Rep. N. S. 828; 9 Ch. Div. 294, 304; 48 L. J. 23, Ch.; 27 W. R. 241.)

Claims in
administra-
tion.

47. In any cause or matter for the administration of the estate of a deceased person, no party other than the executor or administrator shall, unless by leave of the court or a judge, be entitled to appear either in court or in chambers on the claim of any person not a party to the cause or matter against the estate of the deceased person in respect of any debt or liability. The court or a judge may direct or give liberty to any other party to the cause or matter to appear, either in addition to or in the place of the executor or administrator, upon such terms as to costs or otherwise as they or he shall think fit.

As to change of parties by death, bankruptcy, assignment, &c., see Order XVII., rr. 1-10; Wilson, p. 193-197; Annual Prac., p. 331-340.

See further, as to "Parties," Order LV., r. 5, *post*, p. 87, and rules 40-43, *post*.

CHAPTER V.

EVIDENCE.

PART I.

THE leading rules and principles of evidence are the same on applications by Originating Summons as in other civil proceedings. As has already been stated, *ante*, p. 3, an Originating Summons under Order LV., r. 3, is an action within the meaning of sect. 100 of the Judicature Act, 1873 (36 & 37 Vict. c. 66) and of the Rules, and by the same section "pleading" includes a summons. This being so, the orders and rules as to "discovery and inspection" (Order XXXI.), admissions (Order XXXII.), "evidence generally" (Order XXXVII.), and "affidavits and depositions" (Order XXXVIII.) will in a great measure apply to the procedure by Originating Summons. Such of the same orders and rules as are more immediately applicable to the subject in hand are set forth in the present work, with annotations.

The evidence on Originating Summons is usually taken by affidavit, and is subject to cross-examination; but, as will be seen, there is power to take the evidence *vivâ voce*, "in any cause or matter where it shall appear necessary for the purposes of justice": (see Order XXXVII., r. 5, *post*, p. 37.) See also Order LV., rr. 16 and 17, *post*, as to the power of a chief clerk to summon witnesses, &c. As to evidence in particular cases some assistance may be derived from the "Forms" of affidavits, *post*, Appendix III.

ORDER XXXI. (R. S. C., 1883).

Rules 1 to 11 of this order relate to discovery by interrogatories, Discovery.

a practice which is rarely, if ever, resorted to in applications by Originating Summons. But by Order LV., r. 16, *post*, p. 99, the chief clerk has power, when so directed by the judge, to examine parties and witnesses upon interrogatories.

12. Any party may, without filing any affidavit, apply to the court or a judge for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the court or judge may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the cause or matter, or make such order, either generally or limited to certain classes of documents, as may, in their or his discretion, be thought fit.

Application to
Originating
Summons.

As a proceeding commenced by Originating Summons is "a cause or matter," there seems to be no reason why this rule should not apply to such a summons, though probably it would not often be necessary to resort to it. For annotations on this rule see Wilson, p. 258, and Annual Pract. p. 487.

13. The affidavit, to be made by a party against whom such order as is mentioned in the last preceding rule has been made, shall specify which, if any, of the documents therein mentioned he objects to produce, and it shall be in the Form No. 8* in Appendix B., with such variations as circumstances may require.

Production.

14. It shall be lawful for the court or a judge, at any time during the pendency of any cause or matter, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such cause or matter, as the court or judge shall think right; and the court may deal with such documents, when produced, in such manner as shall appear just.

This rule is applicable to Originating Summons: (see Dan. 982; and for annotations Wilson, p. 260, and Annual Prac., p. 492.)

15. Every party to a cause or matter shall be entitled, at any time, by notice in writing, to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such cause or matter, unless he shall satisfy the court or a judge that such document relates only to his own title, he being a defendant to the cause or matter, or that he had some other cause or excuse which the court or judge shall deem sufficient for not complying with such notice: in which case the court or judge may allow the same to be put in evidence on such terms as to costs and otherwise as the court or judge shall think fit.

Notice to
produce.

16. Notice to any party to produce any documents referred to in his pleading or affidavits shall be in the Form No. 9* in Appendix B., with such variations as circumstances may require.

Form of
notice.

17. The party to whom such notice is given shall, within two days from the receipt of such notice, if all the documents therein referred to have been set forth by him in such affidavit as is mentioned in rule 13 or if any of the documents referred to in such notice have not been set forth by him in any such affidavit, then within four days from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from the delivery thereof at which the documents, or such of them as he does not object to produce may be inspected at the office of his solicitor, or in the case of bankers' books or other books of account, or books in constant use for the purposes of any trade or business, at their usual place of custody, and stating which (if any) of the documents he objects to produce,

Compliance
with notice.

and on what ground. Such notice shall be in the Form No. 10 * in Appendix B., with such variations as circumstances may require.

Non-compliance with notice.

18. If the party served with notice under rule 17 omits to give such notice of a time for inspection or objects to give inspection, or offers inspection elsewhere than at the office of his solicitor, the judge may, on the application of the party desiring it, make an order for inspection in such place and in such manner as he may think fit; and, except in the case of documents referred to in the pleadings or affidavits of the party against whom the application is made, or disclosed in his affidavit of documents, such application shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party.

19. An order upon the lord of a manor to allow limited inspection of the court rolls may be made on the application of a copyhold tenant supported by an affidavit that he has applied for inspection, and that the same has been refused.

It is conceived that this application would not be by Originating Summons. That is, it would either be by ordinary summons in a pending matter, or by independent application for *mandamus*: (See *Scriven on Copyholds*, 6th edit., 369.)

Objection to discovery.

20. If the party from whom discovery of any kind or inspection is sought, objects to the same, or any part thereof, the court or a judge may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the cause or matter, or that for any other reason it is desirable that any issue or question in dispute in the cause or matter should be determined before deciding upon the right to the discovery or inspection, order that

such issue or question be determined first, and reserve the question as to the discovery or inspection.

21. If any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall be liable to attachment. He shall also, if a plaintiff, be liable to have his action dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating may apply to the court or a judge for an order to that effect, and an order may be made accordingly.

Non-compliance with order for discovery.

22. Service of an order for interrogatories or discovery or inspection made against any party on his solicitor shall be sufficient service to found an application for an attachment for disobedience to the order. But the party against whom the application for an attachment is made may show in answer to the application that he has had no notice or knowledge of the order.

Service of order.

23. A solicitor, upon whom an order against any party for interrogatories or discovery or inspection is served under the last preceding rule, who neglects without reasonable excuse to give notice thereof to his client, shall be liable to attachment.

Attachment of solicitor.

24. Any party may, at the trial of a cause; matter, or issue, use in evidence any one or more of the answers or any part of an answer of the opposite party to interrogatories without putting in the others or the whole of such answer: Provided always, that in such case the judge may look at the whole of the answers, and if he shall be of opinion that any others of them are so connected with those put in that the last-mentioned answers ought not to be used without them, he may direct them to be put in.

Part of answer.

25. In every cause, or matter, the costs of discovery by interrogatories or otherwise, shall, unless otherwise

Costs of discovery.

ordered by the court or a judge, be secured in the first instance as provided by rule 26 of this order, by the party seeking such discovery, and shall be allowed as part of his costs where, and only where, such discovery shall appear to the judge at the trial, or, if there is no trial, to the court or a judge, or shall appear to the taxing officer, to have been reasonably asked for.

Payment of
5*l.* as security.

26. Any parties seeking discovery by interrogatories shall, before delivery of interrogatories, pay into court to a separate account in the action, to be called "Security for Costs Account," to abide further order, the sum of 5*l.*, and, if the number of folios exceeds five, the further sum of 10*s.* for every additional folio. Any party seeking discovery otherwise than by interrogatories shall, before making application for discovery, pay into court, to a like account, to abide further order, the sum of 5*l.*, and may be ordered further to pay into court as aforesaid such additional sum as the court or a judge shall direct. The party seeking discovery shall, with his interrogatories or order for discovery, serve a copy of the receipt for the said payment into court, and the time for answering or making discovery shall in all cases commence from the date of such service. The party from whom discovery is sought shall not be required to answer or make discovery unless and until the said payment has been made.

Payment out.

27. Unless the court or a judge shall at or before the trial otherwise order, the amount standing to the credit of the "Security for Costs Account" in any cause or matter, shall after the cause or matter has been finally disposed of be paid out to the party by whom the same was paid in on his request, or to his solicitor on such party's written authority, in the event of the costs of the cause or matter being adjudged to him, but in the event of the court or judge ordering him to pay the costs of the cause or matter, the amount in court shall

be subject to a lien for the costs ordered to be paid to any other party.

27a. If after a cause or matter has been finally disposed of, by consent or otherwise, no taxation of costs shall be required, the taxing officer, master, or chief clerk (as the case may be) may, either by consent of the parties, or on being satisfied that any party who has lodged any money to the "security for costs account" in such cause or matter has become entitled to have the same paid out to him, give a certificate to that effect, which certificate shall be acted on and have effect in all respects as if the same had been an order made in the said cause or matter.

This is No. 1 of the R. S. C. Oct. 1884.

28. In any action against or by a sheriff in respect of any matters connected with the execution of his office, ^{Sheriff's action.} the court or a judge may, on the application of either party, order that the affidavit to be made in answer either to interrogatories or to an order for discovery shall be made by the officer actually concerned.

PART II.

ORDER XXXII (R. S. C. 1883).

Admissions.

1. Any party to a cause or matter may give notice, by ^{Admissions.} his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party.

It is difficult to see how this rule can be applied to the procedure by Originating Summons.

2. Either party may call upon the other party to admit ^{Admission of documents} any document, saving all just exceptions; and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so

neglecting or refusing, whatever the result of the cause or matter may be, unless at the trial or hearing the court or a judge shall certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice be given, except where the omission to give the notice is, in the opinion of the taxing officer, a saving of expense.

Notice to
admit.

3. A notice to admit documents shall be in the Form No. 11* in Appendix B., with such variations as circumstances may require.

Admission of
facts.

4. Any party may, by notice in writing, at any time not later than nine days before the day for which notice of trial has been given, call on any other party to admit, for the purposes of the cause, matter, or issue only, any specific fact or facts mentioned in such notice. And in case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the court or a judge, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the cause, matter, or issue may be, unless at the trial or hearing the court or a judge certify that the refusal to admit was reasonable, or unless the court or a judge shall at any time otherwise order or direct. Provided that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular cause, matter, or issue, and not as an admission to be used against the party on any other occasion or in favour of any person other than the party giving the notice: provided also, that the court or a judge may at any time allow any party to amend or withdraw any admission so made on such terms as may be just.

This rule seems not to apply to Originating Summons as it refers to "notice of trial," though the words "cause, matter, or issue" are wide enough to include it.

Form of
notice.

5. A notice to admit facts shall be in the Form No. 12,*

in Appendix B., and admissions of facts shall be in the Form No. 13* in Appendix B., with such variations as circumstances may require.

6. Any party may, at any stage of a cause or matter, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the court or a judge for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court or a judge may upon such application make such order, or give such judgment, as the court or judge may think just. Application
for judgment.

7. An affidavit of the solicitor or his clerk, of the due signature of any admissions made in pursuance of any notice to admit documents or facts, shall be sufficient evidence of such admissions, if evidence thereof be required. Evidence of
admissions.

8. Notice to produce documents shall be in the Form No. 14* in Appendix B., with such variations as circumstances may require. An affidavit of the solicitor, or his clerk, of the service of any notice to produce, and of the time when it was served, with a copy of the notice to produce, shall in all cases be sufficient evidence of the service of the notice, and of the time when it was served. Notice to
produce.

9. If a notice to admit or produce comprises documents which are not necessary, the costs occasioned thereby shall be borne by the party giving such notice. Costs.

PART III.

ORDER XXXVII. (R. S. C. 1883.)

1. *Evidence Generally.*

1. In the absence of any agreement in writing between the solicitors of all parties, and subject to these rules, the witnesses at the trial of any action or at any assess- Oral evidence
generally.

ment of damages shall be examined *vivâ voce* and in open court, but the court or a judge may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the court or judge may think reasonable, or that any witness whose attendance in court ought for some sufficient cause to be dispensed with be examined by interrogatories or otherwise before a commissioner or examiner; provided that, where it appears to the court or Judge that the other party *bonâ fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit.

Cross-examination.

The language of this rule is very wide, and, though it may not often come into operation with regard to the procedure by Originating Summons it has a bearing thereon. For instance, the power to impose conditions upon which an affidavit may be read at the hearing might be held to enable the court to order the cross-examination of a deponent upon his affidavit before the court itself instead of before an examiner. And see *De Mora v. Concha* (54 L. T. Rep. N. S. 554, 557; 32 Ch. Div. 133, 144), and on appeal *Concha v. Concha*, 11 App. Ca. 542; 55 L. T. Rep. N. S. 522, and *Wilson*, 308, and Annual Pract. 560.

Evidence in another cause.

2. In default actions *in rem*, and in references in Admiralty actions, evidence may be given by affidavit.

3. An order to read evidence taken in another cause or matter shall not be necessary, but such evidence may, saving all just exceptions, be read on *ex parte* applications by leave of the court or a judge, to be obtained at the time of making any such application, and in any other case upon the party desiring to use such evidence giving two days' previous notice to the other parties of his intention to read such evidence.

The force of the words "saving all just exceptions" must not be overlooked. It is assumed that evidence taken in another cause or

matter between strangers to the action in which the order to read evidence is made would not be allowed to be read, and see Wilson, 309.

4. Office copies of all writs, records, pleadings, and documents filed in the High Court of Justice shall be admissible in evidence in all causes and matters and between all persons or parties, to the same extent as the original would be admissible. Office copies.

2. *Examination of Witnesses.*

5. The court or a judge may, in any cause or matter where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before the court or judge or any officer of the court, or any other person and at any place, of any witness or person, and may empower any party to any such cause or matter to give such depositions in evidence therein on such terms, if any, as the court or a judge may direct. Order for examination.

See *De Mora v. Concha*, *supra*, p. 36.

7. The court or a judge may in any cause or matter at any stage of the proceedings order the attendance of any person for the purpose of producing any writings or other documents named in the order which the court or judge may think fit to be produced: Provided that no person shall be compelled to produce under any such order any writing or other document which he could not be compelled to produce at the hearing or trial. Ordering witness to attend.

20. Any party in any cause or matter may by *subpoena ad testificandum* or *duces tecum*, require the attendance of any witness before an officer of the court, or other person appointed to take the examination, for the purpose of using his evidence upon any proceeding in the cause or matter in like manner as such witness would be bound to attend and be examined at the hearing or trial; and any party or witness having made an affidavit to be used Subpoena.

or which shall be used on any proceeding in the cause or matter shall be bound on being served with such *subpœna* to attend before such officer or person for cross-examination.

See *La Trinidad Limited v. Browne* (84 L. T. 62; W. N. 1887, p. 208.)

Evidence
after hearing.

21. Evidence taken subsequently to the hearing or trial of any cause or matter shall be taken as nearly as may be in the same manner as evidence taken at or with a view to a trial.

Practice.

22. The practice with reference to the examination, cross-examination, and re-examination of witnesses at a trial shall extend and be applicable to evidence taken in any cause or matter at any stage:

See *La Trinidad v. Browne, supra*.

23. The practice of the court with respect to evidence at a trial, when applied to evidence to be taken before an officer of the court or other person in any cause or matter after the hearing or trial, shall be subject to any special directions which may be given in any case.

Affidavit
before issue
joined.

24. No affidavit or deposition filed or made before issue joined in any cause or matter shall without special leave of the court or a judge be received at the hearing or trial thereof, unless within one month after issue joined, or within such longer time as may be allowed by special leave of the court or a judge, notice in writing shall have been given by the party intending to use the same to the opposite party of his intention in that behalf.

Evidence used
after hearing.

25. All evidence taken at the hearing or trial of any cause or matter may be used in any subsequent proceedings in the same cause or matter.

3. *Subpœna*.

Præcipe for
subpœna.

26. Where it is intended to sue a *subpœna*, a *præcipe* for that purpose, in the Form No. 21,* in Appendix G.,

and containing the name or firm and the place of business or residence of the solicitor intending to sue out the same, and, where such solicitor is agent only, then also the name or firm and place of business or residence of the principal solicitor, shall in all cases be delivered and filed at the central office.

27. A writ of *subpœna* shall be in one of the Forms Form. 1 to 7* in Appendix J., with such variations as circumstances may require.

28. Where a *subpœna* is required for the attendance of a witness for the purpose of proceedings in chambers, such *subpœna* shall issue from the central office upon a note from the judge. *Subpœna in chambers.*

See Order LV., rr. 16 and 17, *post*.

29. Every *subpœna* other than a *subpœna duces tecum* shall contain three names where necessary or required, but may contain any larger number of names. *Several persons in one subpœna.*

30. No more than three persons shall be included in one *subpœna duces tecum*, and the party suing out the same shall be at liberty to sue out a *subpœna* for each person if it shall be deemed necessary or desirable.

31. In the interval between the suing out and service of any *subpœna* the party suing out the same may correct any error in the names of parties or witnesses, and may have the writ re-sealed upon leaving a corrected *præcipe* of such *subpœna* marked with the words "altered and re-sealed," and signed with the name and address of the solicitor suing out the same. *Corrections.*

32. The service of a *subpœna* shall be effected by delivering a copy of the writ, and of the indorsement thereon, and at the same time producing the original writ. *Service.*

33. Affidavits filed for the purpose of proving the service of a *subpœna* upon any defendant must state when, where, and how, and by whom, such service was effected. *Affidavits of service.*

Time.

34. The service of any *subpoena* shall be of no validity if not made within twelve weeks after the *teste* of the writ.

Rules 35 to 38 relate to perpetuating testimony, and rules 39 to 51 relate to the examination of witnesses before examiners of the court, and it is not considered that these rules or the remaining rules of this order, which are not hereinbefore set forth are sufficiently material to the subject in hand to be inserted here.

PART IV.

ORDER XXXVIII. (R. S. C. 1883.)

1. *Affidavits and Depositions.*

Affidavit and cross-examination.

1. Upon any motion, petition, or summons evidence may be given by affidavit; but the court or a judge may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit.

As already stated, the evidence upon Originating Summons is usually given by affidavit.

This rule is silent as to where the cross-examination should take place. It is usually before an examiner: (see *Dan.* 636; and *La Trinidad Limited v. Browne*, *ante*, p. 38.)

But it is suggested in the *Annual Pract.*, p. 581, that it may be taken before the court itself, or before an examiner, citing *Dan.* 637, n., and see *ante*, p. 36.

In *Lumb v. Osburn* (W. N. 1884, p. 218), a deponent who resided at Leeds was ordered to be cross-examined on his affidavit before a registrar of the County Court, but in *Pye v. Pye* (W. N. 1885, p. 175) Mr. Justice Chitty refused leave to cross-examine before a district registrar, and said that the plaintiff must either take one of the examiners of the court down to Birkenhead, or bring the deponents to London, which would probably be the least expensive course.

Title of affidavit.

2. Every affidavit shall be intituled in the cause or matter in which it is sworn; but in every case in which there are more than one plaintiff or defendant, it shall be sufficient to state the full name of the first plaintiff or defendant respectively, and that there are other plaintiffs

or defendants, as the case may be; and the costs occasioned by any unnecessary prolixity in any such title shall be disallowed by the taxing officer.

3. Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted. The costs of every affidavit which shall unnecessarily set forth matters of hearsay, or argumentative matter, or copies of or extracts from documents, shall be paid by the party filing the same.

Contents of affidavits.

This rule is not observed with absolute strictness in practice. For instance, in proving births and marriages in accordance with a well known rule of evidence, the affidavit is not infrequently made by a member of the family who was not present on the occasion. With regard to documents it is not uncommon to set forth parts of them in order to make the rest of the affidavit intelligible, and it is apprehended that this would not be "unnecessarily" setting forth extracts from documents. In referring to letters received by a deponent, such letters should be merely made exhibits to the affidavit, but in dealing with letters written by the deponent it is usual to set forth copies in the affidavit. The rule as to unnecessarily setting forth extracts from documents was enforced in *Hirst v. Proctor* (W. N. Jan. 24, 1882, p. 12), by making the offending parties pay the costs of the affidavits, which included such extracts.

As to the importance of stating grounds of belief, see per Lord Selborne in *Bidder v. Bridges* (50 L. T. Rep. N. S. 287, 289; 26 Ch. Div. 1, 8).

4. Affidavits sworn in England shall be sworn before a judge, district registrar, commissioner to administer oaths, or officer empowered under these rules to administer oaths.

5. Every commissioner to administer oaths shall express the time when and the place where he shall take any affidavit, or the acknowledgment of any deed, or recognisance; otherwise the same shall not be held authentic, nor be admitted to be filed or enrolled without the leave of the court or a judge; and every such com-

missioner shall express the time when, and the place where, he shall do any other act incident to his office.

Before whom
sworn.

6. All examinations, affidavits, declarations, affirmations, and attestations of honour in causes or matters depending in the High Court, and also acknowledgments required for the purpose of enrolling any deed in the Central Office, may be sworn and taken in Scotland or Ireland or the Channel Islands, or in any colony, island, plantation, or place under the dominion of Her Majesty in foreign parts, before any judge, court, notary public, or person lawfully authorised to administer oaths in such country, colony, island, plantation, or place respectively, or before any of Her Majesty's consuls or vice-consuls in any foreign parts out of Her Majesty's dominions; and the judges and other officers of the High Court shall take judicial notice of the seal or signature, as the case may be, of any such court, judge, notary public, person, consul, or vice-consul, attached, appended, or subscribed to any such examinations, affidavits, affirmations, attestations of honour, declarations, acknowledgments, or to any other deed or document.

Form.

7. Every affidavit shall be drawn up in the first person, and shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and as nearly as may be shall be confined to a distinct portion of the subject. Every affidavit shall be written or printed bookwise. No costs shall be allowed for any affidavit or part of an affidavit substantially departing from this rule.

For annotations on Rules 4 to 7, see Wilson, pp. 321, 322, and Annual Pract. 583-585.

8. Every affidavit shall state the description and true place of abode of the deponent.

If the deponent is a party to the action it is usual to refer to him as plaintiff or defendant, as the case may be, in addition to his ordinary description. See Dan. F., p. 4, note (e). "Stock Exchange" is an insufficient address: (*Re Levy*; *Levin v. Levin*, 60 L. T. Rep. N. S. 317; 37 W. R. 396).

9. In every affidavit made by two or more deponents Jurat. the names of the several persons making the affidavit shall be inserted in the jurat, except that if the affidavit of all the deponents is taken at one time by the same officer it shall be sufficient to state that it was sworn by both (or all) of the "above-named" deponents.

10. Every affidavit or other proof used in Admiralty actions shall be filed in the Admiralty Registry: every affidavit used in Probate actions shall be filed in the Probate Registry: every affidavit used on the Crown side of the Queen's Bench Division shall be filed in the Crown Office Department: every affidavit used in a cause or matter proceeding in a district registry shall be filed there: and every other affidavit used shall be filed in the Central Office. There shall be [endorsed on (a)] every affidavit a note showing on whose behalf it is filed, and no affidavit shall be filed or used without such note, unless the court or a judge shall otherwise direct.

11. The court or a judge may order to be struck out Scandalous matter. from any affidavit any matter which is scandalous, and may order the costs of any application to strike out such matter to be paid as between solicitor and client.

12. No affidavit having in the jurat or body thereof Interlineation and erasures. any interlineation, alteration, or erasure, shall without leave of the court or a judge be read or made use of in any matter depending in court unless the interlineation or alteration (other than by erasure) is authenticated by the initials of the officer taking the affidavit, or, if taken at the central office, either by his initials or by the stamp of that office, nor in the case of an erasure, unless the words or figures appearing at the time of taking the affidavit to be written on the erasure are rewritten and

(a) The words in brackets were substituted for "appended to" by R. S. C., December, 1885.

signed or initialled in the margin of the affidavit by the officer taking it.

Illiterates and blind.

13. Where an affidavit is sworn by any person who appears to the officer taking the affidavit to be illiterate or blind, the officer shall certify in the jurat that the affidavit was read in his presence to the deponent, that the deponent seemed perfectly to understand it, and that the deponent made his signature in the presence of the officer. No such affidavit shall be used in evidence in the absence of this certificate, unless the court or a judge is otherwise satisfied that the affidavit was read over to and appeared to be perfectly understood by the deponent.

Defects waived.

14. The court or a judge may receive any affidavit sworn for the purpose of being used in any cause or matter, notwithstanding any defect by misdescription of parties or otherwise in the title or jurat, or any other irregularity in the form thereof, and may direct a memorandum to be made on the document that it has been so received.

Stamping.

15. In cases in which by the present practice an original affidavit is allowed to be used, it shall before it is used be stamped with a proper filing stamp, and shall at the time when it is used be delivered to and left with the proper officer in court or in chambers, who shall send it to be filed. An office copy of an affidavit may in all cases be used, the original affidavit having been previously filed, and the copy duly authenticated with the seal of the office.

Not to be sworn before party's solicitor.

16. No affidavit shall be sufficient if sworn before the solicitor acting for the party on whose behalf the affidavit is to be used, or before any agent or correspondent of such solicitor, or before the party himself.

17. Any affidavit which would be insufficient if sworn before the solicitor himself shall be insufficient if sworn before his clerk, or partner.

18. Where a special time is limited for filing affidavits Time.
no affidavit filed after that time shall be used, unless by
leave of the court or a judge.

19. Except by leave of the court or a judge no order Orders
made *ex parte* in court founded on any affidavit shall be *ex parte*.
of any force unless the affidavit on which the application
was made was actually made before the order was
applied for, and produced or filed at the time of making
the motion.

19a. The consent of a new trustee to act shall be suffi- Consent of
ciently evidenced by a written consent signed by him, new trustee.
and verified by the signature of his solicitor. Form I. in
the Appendix hereto shall be used with such variations
as circumstances may require, and may be cited as
Form 29 in Appendix L.

This rule was added by R. S. C., Dec., 1885, No. 14.

For this form see *post*, Appendix II.

Where a new trustee is appointed in Chancery as well as in Lunacy
his consent to act may be verified in manner provided by this rule.

Secus, where the order is made in lunacy only: (*Re Hume, a*
person of unsound mind, 56 L. T. Rep. N. S. 351; 35 Ch. Div.
457, C. A.)

"Appointment of new trustees" is dealt with in Chapter X.,
post.

2. *Affidavits and Evidence in Chambers.*

20. The party intending to use any affidavit in support Notice to use
of any application made by him in chambers in the affidavit.
Chancery Division shall give notice to the other parties
concerned of his intention in that behalf.

21. All affidavits which have been previously made and Affidavits pre-
read in court upon any proceeding in a cause or matter viously used.
may be used before the judge in chambers.

This, of course, means in the same cause or matter. As to read-
ing evidence taken in another cause or matter, see Order XXXVII.,
r. 3, *ante*, p. 36.

22. Every alteration in an account verified by affidavit Alterations.

to be left at chambers shall be marked with the initials of the commissioner or officer before whom the affidavit is sworn, and such alterations shall not be made by erasure.

Exhibits.

23. Accounts, extracts from parish registers, particulars of creditors' debts, and other documents referred to by affidavit, shall not be annexed to the affidavit, or referred to in the affidavit as annexed, but shall be referred to as exhibits.

24. Every certificate on an exhibit referred to in an affidavit signed by the commissioner or officer before whom the affidavit is sworn shall be marked with the short title of the cause or matter.

3. *Trial on Affidavit.*

Filing
affidavits.

25. Within fourteen days after a consent for taking evidence by affidavit as between the parties has been given, or within such time as the parties may agree upon, or the court or a judge may allow, the plaintiff shall file his affidavits and deliver to the defendant or his solicitor a list thereof.

26. The defendant, within fourteen days after delivery of such list, or within such time as the parties may agree upon, or the court or a judge may allow, shall file his affidavits and deliver to the plaintiff or his solicitor a list thereof.

27. Within seven days after the expiration of the last-mentioned fourteen days, or such other time as aforesaid, the plaintiff shall file his affidavits in reply, which affidavits shall be confined to matters strictly in reply, and shall deliver to the defendant or his solicitor a list thereof.

Cross-exami-
nation

28. When the evidence is taken by affidavit, any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party may serve upon the party by whom such affidavit has been filed a

notice in writing, requiring the production of the deponent for cross-examination at the trial, such notice to be served at any time before the expiration of fourteen days next after the end of the time allowed for filing affidavits in reply, or within such time as in any case the court or a judge may specially appoint; and unless such deponent is produced accordingly, his affidavit shall not be used as evidence unless by the special leave of the court or a judge. The party producing such deponent for cross-examination shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production.

29. The party to whom such notice as is mentioned in the last preceding rule is given shall be entitled to compel the attendance of the deponent for cross-examination in the same way as he might compel the attendance of a witness to be examined.

30. When the evidence under this order is taken by Printing. affidavit, such evidence shall be printed, and the notice of trial shall be given at the same time after the close of the evidence as in other cases is by these rules provided after the close of the pleadings: provided that other affidavits may be printed if all the parties interested consent thereto, or the court or a judge so order: provided also that this rule shall not apply in the Probate, Divorce, and Admiralty Division to default actions *in rem*, or references in actions, or actions for limitation of liability, unless the Court or a judge shall otherwise order.

Rules 25, 26, and 27 of this order do not apply to the evidence on Originating Summons, but apparently by force of Order XXXVII., r. 21, *ante*, p. 38, rule 28 of this order applies to affidavits filed subsequent to the hearing or trial of any cause or matter (which includes a proceeding commenced by Originating Summons): (see *Backhouse v. Alcock*, 52 L. T. Rep. N. S. 342; 28 Ch. Div. 669; *Re Baker*; *Connell v. Baker*, 52 L. T. Rep. N. S. 421; 29 Ch. Div. 711; but see *Concha v. Concha*, 55 L. T. Rep. N. S. 522; 11 App. Cas. 541.) "The

practice as to the examination, cross-examination, and re-examination of witnesses is to be the same both at the trial and at any other stage of the action": (*Per* Kay, J. in *Mansel v. Clanricarde*; *Mansel v. Norton*, 53 L. T. Rep. N. S. 496, 498.)

It is not the practice to print affidavits for use on the hearing of an Originating summons. The court views with some suspicion lengthened cross-examinations before examiners. The fact that a cross-examination on an affidavit is not concluded does not prevent the court from looking at the affidavit: (*Lewis v. James*, 54 L. T. Rep. N. S. 260, C. A.)

CHAPTER VI.

ORDER LIV. (R. S. C., 1883).

APPLICATIONS AND PROCEEDINGS AT CHAMBERS.

1. *General.*

1. Every application at chambers not made *ex parte* Summons. shall be made by summons.

By sect. 39 of the Judicature Act, 1873 (36 & 37 Vict. c. 66) it is enacted that, "Any judge of the said High Court of Justice may, subject to any rules of court, exercise in court or in chambers all or any part of the jurisdiction by this Act vested in the said High Court in all such causes and matters, and in all such proceedings in any causes or matters as before the passing of this Act might have been heard in court or in chambers respectively by a single judge of any of the courts whose jurisdiction is hereby transferred to the said High Court, or as may be directed or authorised to be so heard by any rules of court to be hereafter made. In all such cases any judge sitting in court shall be deemed to constitute a court."

2. Every application for payment or transfer out of court made *ex parte*, and every other application made *ex parte* in which the judge or proper officer shall think fit so to require, shall be made by summons.

For examples of *ex parte* applications see Annual Pract. under this rule.

3. Summonses shall not be altered after they are sealed except upon application at chambers.

Alteration of
summons.

An Originating Summons can usually be amended upon *ex parte* application at chambers without formal order, see Dan. 969, and for forms see Dan. F. 1082 and 1083. See also *ante*, p. 10.

4. An originating summons, where service is necessary, shall be served seven clear days before the return thereof. Every other summons shall be served two clear

Service of
summons.

days before the return thereof, unless in any case it shall be otherwise ordered.

An Originating Summons ought to be served *personally* (see Dan. p. 970); as nearly as may be in the manner prescribed for the personal service of a writ of summons (see Order LXVII., r. 5, *post*, Chapter XV.)

As to service of writ of summons, including substituted service and service on particular defendants, see Order IX.; Wilson, 145. In *Hunt v. Austin*; *Ex parte J. N. Mason* (47 L. T. Rep. N. S. 300; 9 Q. B. Div. 598; 51 L. J. 455, Q. B. (C. A.)), substituted service of a summons was allowed; and see Dan. p. 971. And in an unreported case of *Chambers and another v. Gascoyne* (advertised in the *Times* of the 11th Aug. 1888) substituted service of an Originating Summons was allowed by advertisement in the *Times* and *Standard* newspapers. For form of advertisement see Appx. II. *post*.

The Court cannot give leave to serve an Originating Summons out of the jurisdiction: (see *Re Busfield*; *Whaley v. Busfield*, 54 L. T. Rep. N. S. 220; 32 Ch. Div. 123; 55 L. J., 467, Ch.; 34 W. R. 372, C. A. See further *post*, pp. 88, 89.)

Proceedings
ex parte.

5. Where any of the parties to a summons fail to attend, whether upon the return of the summons, or at any time appointed for the consideration or further consideration of the matter, the judge may proceed *ex parte*, if, considering the nature of the case, he think it expedient so to do; no affidavit of non-attendance shall be required or allowed, but the judge may require such evidence of service as he may think just.

6. Where the judge has proceeded *ex parte*, such proceedings shall not in any manner be reconsidered in the judge's chambers, unless the judge shall be satisfied that the party failing to attend was not guilty of wilful delay or negligence; and in such case the costs occasioned by his non-attendance shall be in the discretion of the judge, who may fix the same at the time, and direct them to be paid by the party or his solicitor before he shall be permitted to have such proceeding reconsidered, or make such other order as to such costs as he may think just.

7. Where a proceeding in chambers fails by reason of the non-attendance of any party, and the judge does not think it expedient to proceed *ex parte*, the judge may order such an amount of costs (if any) as he shall think reasonable to be paid to the party attending by the absent party or by his solicitor personally. Costs through non-attendance.

8. Where matters in respect of which summonses have been issued are not disposed of upon the return of the summons, the parties shall attend from time to time without further summons, at such time or times as may be appointed for the consideration or further consideration of the matter. Summons not disposed of.

9. In every cause or matter where any party thereto makes any application at chambers, either by way of summons or otherwise, he shall be at liberty to include in one and the same application all matters upon which he then desires the order or directions of the court or judge; and upon the hearing of such application it shall be lawful for the court or judge to make any order and give any directions relative to or consequential on the matter of such application as may be just; any such application may, if the judge thinks fit, be adjourned from chambers into court, or from court into chambers. Several matters in one summons. Adjournment.

An adjournment from the chief clerk to the judge is not an appeal: (see *Re Watts*; *Smith v. Watts*, 48 L. T. Rep. N. S. 167; 22 Ch. Div. 1, 12; 52 L. J. 209, Ch.; 31 W. R. 262 (C. A.) Therefore it is conceived that the plaintiff's counsel or solicitor should always open an adjourned summons although it may have been adjourned at the instance of the defendant.

As to the practice of the late Mr. Justice Pearson on adjournments from the chief clerk to the judge, see W. N. 1884, p. 218.

10. A summons other than an Originating Summons shall be in the Form No. 1 * in Appendix K., with such variations as circumstances may require, and shall be addressed to all the persons on whom it is to be served. Form of ordinary summons.

It is not sufficient to address the summons to the solicitors of the persons on whom it is to be served.

NOTE.—Rules 11 to the end of this order relate to proceedings in the Queen's Bench, and Probate, Divorce, and Admiralty Divisions, but applications by Originating Summons in those divisions are so rare that it is not thought necessary to insert such rules here. As to "Interpleader," see Chapter XI., *post*.

CHAPTER VII.

ORDER LV. (a) OF THE RULES OF THE SUPREME COURT, 1883, RULES 1 AND 2.

CHAMBERS IN THE CHANCERY DIVISION.

1. *General.*

1. The business in chambers of the judges of the Chancery Division, to whom chambers are attached, shall be carried on in conjunction with their court business. Business in chambers.

"A judge sitting in chambers does not mean that he is sitting in any particular room, but that he is not sitting in open court" (*per* Brett, L.J. in *Hartmont v. Foster*, 45 L. T. Rep. N. S. 429; 8 Q. B. Div. 82, 84, C. A.) And often judges when holding their "sittings in chambers," actually sit in the courts for convenience.

A judge is sitting "at the Royal Courts of Justice" when he is sitting in any part of the building, whether in chambers or in open court; so a notice of motion for attachment was held sufficient which stated that the court would be moved at the Royal Courts of Justice on a specified date, though the motion was in fact made before the Vacation Judge sitting in chambers: (*Petty v. Daniel*, 34 Ch. Div. 172, 176; 55 L. T. Rep. N. S. 745; 56 L. J. 192, Ch.; 35 W. R. 151.)

1a. In any proceeding before the judge in chambers any party may, if he so desire, be represented by counsel. : (*Rules December, 1885.*) Counsel in chambers.

It is believed to be usual, though not necessary, to give notice to the other side that it is intended to employ counsel, so as to enable them, if they think fit, to be similarly represented, as otherwise they might desire an adjournment for the purpose of obtaining the assistance of counsel.

(a) This order was amended and its scope enlarged by rules of December, 1885, and subsequent rules, which are here inserted in their proper place and distinguished by a letter placed after the number, as for example 1a or in some other way. Those of December will be found in the *Law Times* of Dec. 26, 1885, and W. N. of Jan. 2, 1886.

One advantage gained by the presence of counsel for all parties is that usually, where all parties are so represented, an appeal may be had direct from the judge in chambers to the Court of Appeal without first applying to the judge in court, on motion, to discharge the order which he himself has made in chambers : (see Chapter XII. *post.*) In more than one case (*Re Tweedy*, 28 Ch. Div. 544; *Re Bethlehem*, 53 L. T. Rep. N. S. 558; 30 Ch. Div. 543) the judges have expressed their opinion in favour of employment of counsel in chambers.

2. The business to be disposed of in chambers by judges of the Chancery Division shall consist of the following matters, in addition to the matters which, under any other rule, or by statute, may be disposed of in chambers.

For examples of procedure under statutes see Part II., *post.*

Payment out.

(1.) Applications for payment or transfer to any person of any cash or securities standing to the credit of any cause or matter where there has been a judgment or order declaring the rights, or where the title depends only upon proof of the identity, or the birth, marriage, or death of any person.

These applications will usually be made by ordinary summons.

For forms see Dan. F., pp. 769 *et seq.*

It should be noticed that this sub-section does *not* authorise a summons when the title depends on "default of issue" of any person. It applies to cash and securities of whatever amount, and in this respect differs from sub-sect. (2), which is limited to 1000*l.*

Sub-sect. (1) of rule 2 is not cut down or qualified by sub-sect. (7), or any other of the sub-sections of rule 2 following sub-sect. (1), so that even where the fund is over 1000*l.*, if there has been "an order declaring the rights" within the meaning of sub-sect. (1), the application for payment out ought to be made by summons : (*Re Brandram*, 25 Ch. Div. 366; 49 L. T. Rep. N. S. 558; 53 L. J. 331, Ch.; 32 W. R. 180; and *Bates v. Moore*, 58 L. T. Rep. N. S. 513; 38 Ch. Div. 381; 36 W. R. 586; 57 L. J. 789, Ch.) But *Re Brandram* was dissented from by Pearson, J. in *Re Rhodes* (54 L. T. Rep. N. S. 294; 31 Ch. Div. 499; 55 L. J. 477, Ch.), and see *Re Barker* (W. N. 1884, p. 237).

Sub-sect. (1) applies to money paid in under the L. C. C. Acts, as well as to other cases : (*Re Brandram*, *sup.*)

A petition was held necessary for the division into thirds of a fund in court exceeding 1000*l.*, and the carrying over of those thirds to separate accounts, there having been no order declaring the rights of the parties: (*Re Jellard's Trusts*, W. N. 1888, p. 42.)

Although the mere fact that a sum exceeds 1000*l.* will not justify a petition, it is clear that in some cases when the rules authorise Originating Summons the court allows costs on, and even prefers, procedure by petition.

"The general rule is that, although the proper method is to make applications like the present in chambers, yet there are often circumstances which justify the applications being made in court by petition. I entirely agree in many cases with what the late Mr. Justice Pearson says, in *Re Rhodes* (54 L. T. Rep. N. S. 294; 31 Ch. Div. 499), as to the advantages of proceeding by petition, and also as to safeguards afforded by that mode of procedure. There are many applications where the facts are complicated or difficult or intricate questions arise. For instance, there are many cases of that kind which occur in the class of applications referred to by sub-sect. (5) and sub-sect. (7), under the L. C. C. Act, 1845. In such complicated cases it is a great advantage to have the application made by petition:" (per Chitty, J., in *Re Broadwood's Trusts* (55 L. T. Rep. N. S. 312; 55 L. J. 646, Ch.) A petition was allowed as a cheaper and better method, notwithstanding the rules, in *Re Bethlehem* (53 L. T. Rep. N. S. 558; 30 Ch. Div. 542; 54 L. J. 1143, Ch.), where the application was made for permanent investment under sub-sect. (7). In this case Mr. Justice Chitty said: "There are cases in which it is really much cheaper to apply by petition, and in such a case not to make an order or to disallow the costs would be monstrous. Cases where a petition is preferable are not unusual. For instance, I had a case before me where it took nearly six months to get the order in chambers, and I ascertained that the cost of that proceeding by summons far exceeded the costs that would have been incurred on petition. It was an application under the Lands Clauses Act," &c. Petitions were presented and no objection raised, in *Ex parte Parson of St. Alphege* (55 L. T. Rep. N. S. 314), where the entire sum paid in was only 51*l.* and the same course was taken in *Re Mill's Estate* (*Ib.* 465), where the sum was 1000*l.*

See also the cases cited under the following sub-sections.

Under a "scheme" the land and money belonging to a charity were vested in the Official Trustee of Charity Lands and the Official Trustee of Charitable Funds. Some of the land was taken by the Metropolitan Board of Works and the money paid into court. A

petition was presented by the local trustees of the charity who managed the lands and income, for "interim investment in consols of a sum of 34,000*l.* cash in court, and payment of dividends." Costs of petition were allowed by Mr. Justice Chitty, "having regard to the provisions of the scheme." Costs of service of the official trustee, who did not appear, were also allowed: (*Re Stafford's Charity*, 57 L. T. Rep. N. S. 846.)

The following extract is taken from the *Law Times* of Feb. 26, 1887:

"In a petition before Mr. Justice North for payment out of court of a sum of less than 1000*l.* paid in by the Lancashire and Yorkshire Railway Company, counsel for the company was instructed to consent to the payment by the company of the costs of the petition, on the express ground that the costs would have been greater if the petitioner had proceeded by summons in chambers. Both the judge and the registrar in court received this statement with incredulous amusement, but we believe that the experience of practitioners in many cases bears out the statement of the counsel for the railway company:" (see also *Re Bethlehem, sup.*).

Under 1000*l.* (2.) Applications for payment or transfer to any person of any cash or securities standing to the credit of any cause or matter where the cash does not exceed 1000*l.*, or the securities do not exceed 1000*l.* nominal value.

These applications are by ordinary summons. For forms see Dan. F. p. 769 *et seq.*

Application for the payment or transfer out of court, to a person absolutely entitled, of a fund of less amount than 1000*l.* paid into court under the L. C. C. Act is governed by sub-sect. (2) and ought to be made by summons.

The general expressions of sub-sect. (2) are not to be construed as in any way qualified or modified by the subsequent sub-sections, and the provisions as to the L. C. C. Act in sub-sect. (7) do not cut down the general provisions in sub-sect. (2): (*Ex parte Maidstone and Ashford Railway*, 25 Ch. Div. 168; 49 L. T. Rep. N. S. 777; 53 L. J. 127, Ch.; 32 W. R. 181; *Re Calton's Will*, 25 Ch. Div. 240; 49 L. T. Rep. N. S. 398, 566; 53 L. J. 329, Ch.; 32 W. R. 150, 167). (a) And the rule is the same where the money has been paid in under sect. 85 of the L. C. C. Act for immediate possession: (*Re Madgwick*, 25 Ch. Div. 371; 49 L. T. Rep. N. S. 560;

(a) Mr. Justice Pearson in this case withdrew his opinion that a petition was necessary, nevertheless he still retained it, and see *Re Barker* (W. N. 1884, p. 237.)

53 L. J. 333, Ch.; 32 W. R. 512.) In cases of complication, notwithstanding the rules, the application may be made by petition: (see p. 55 above.)

Application cannot be made in chambers under this sub-section for payment out of a share amounting to less than 1000*l.* in a fund which exceeds 1000*l.*: (*May v. Dowse*, W. N. 1884, p. 122.)

In *Drake v. Greaves* (55 L. T. Rep. N. S. 353) a summons for payment out of 207*l.*, part of a sum of 2420*l.* was allowed, but it is necessary to observe that there had been a previous petition in that case.

In *Re Arnold* (W. N. 1887, p. 122, cited in 83 L. T. 234) Mr. Justice North allowed costs of petition for payment out of 417*l.* Bank of England Stock, though the nominal value was less than 1000*l.*, on the ground that the costs of Originating Summons and the statement of facts which the chief clerk would require would be practically the same as costs of a petition.

Where cash and securities together exceeded 1000*l.*, a petition was held proper: (*Re Haworth*, W. N. 1885, p. 48.)

Where the sum paid in was 1000*l.*, but accrued interest which had not been credited brought the amount above 1000*l.*, costs of petition were allowed: (*Ex parte Trustees of Finsbury and City of London Savings Bank*, W. N. Aug. 7, 1886, p. 150.)

In *Re Earl De Grey's Entailed Estate* (84 L. T. 116; W. N. 1887, p. 241) the sum paid in was only 362*l.*, and the tenant for life had contracted with a builder for the erection of two new cottages in substitution for those taken by the company. He presented a petition for payment out on his undertaking to apply it. Mr. Justice North ordered the money to be paid out on production of an affidavit that half the contract price had been expended, and allowed costs of petition as in *Re Arnold*.

Money had been paid into court by executors under the Trustee Relief Act, to the credit of an account entitled "In the matter of the trusts of the sale moneys of certain real estate formerly belonging to E., deceased, and subject to the trusts of a certain royal warrant dated the 6th Aug. 1861." The fund had originally been about 1500*l.* On an application by summons under Order LV., 600*l.*, part of the fund, was ordered to be paid out, but as to the remainder, the summons stood over for further evidence as to the death of an annuitant. The further evidence having been obtained the application was renewed, the summons asking for payment out of the balance to the applicant. It was held by Mr. Justice Kay (who pointed out that the fund originally exceeded 1000*l.*) that the case was not within Order LV. at all, and the application ought to be made by petition and not by summons: (*Re Evun Evans*, 54 L. T. Rep. N. S. 527.)

As to bringing funds into court generally see the Supreme Court Funds Rules, 1886 (*a*); Wilson, 724 *et seq.*; and see also Seton, 79; Dan. 1748.

As to payment, transfer, and delivery out generally, see S. C. F. Rules, 1886, and Seton, 100; Dan. 1790.

On bespeaking all orders dealing with funds in court the paymaster's certificate of the fund must be left with the registrar: (Seton, 101-2.)

The exact amount of money to be raised, and amount and description of the securities to be dealt with, must be stated in the certificate: (Seton, 105.)

Interest.

(3.) Applications for payment to any person of the dividend or interest on any securities standing to the credit of any cause or matter, whether to a separate account or otherwise.

These applications are by ordinary summons. For forms see Dan. F. 1759 *et seq.*

This sub-rule applies to securities of whatever amount.

As to payment of dividends, &c., see S. C. F. Rules, 1886; Wilson, 724 *et seq.*; Seton, 91; and Dan. 1792.

Legacy Duty Act.

(4.) Applications under 36 Geo. 3, c. 52, s. 32 (the Legacy Duty Act) in all cases where the money or securities in court do not exceed 1000*l.*, or 1000*l.* nominal value.

These applications are by originating summons, unless an order has been previously made in the matter, in which case an ordinary summons will suffice: (see Dan. F., p. 938, note *x*; and for forms see Dan. F. 2152.)

In *Re Coore* (W. N. 1883, p. 169; 76 L. T. Nov. 24, 1883, p. 61) Mr. Justice Chitty held that *petition* was necessary on application for advancement where the money, paid in under the Legacy Duty Act, exceeded 1000*l.* In *Re Barker (an Infant)* the chief clerk had made an order in chambers for transfer out of court of a fund exceeding 1000*l.* paid in under the above-mentioned Act. Proof of identity and attainment of age was given. The registrar doubted whether there was jurisdiction in chambers, and Mr. Justice Pearson preferred to make the order on *motion* as provided by the above Act (W. N. 1884, p. 237).

(a) It was not considered necessary to encumber this work with these rules, but a few of them will be found in Appendix I., *post*.

Payment in.

The above Act (*a*) enables payment in of legacies, or residues, belonging both to infants and persons beyond seas. The duty is to be paid before payment in, and then payment in is a discharge to the person paying, as to the money paid in. The Act (sect. 32) provided that, if the money was improperly paid in, the court could dispose of it on petition, and also provided for cases of payment of too much or too little duty. The above rule authorises summons in lieu of petition in cases within its scope.

If the money amounts to 40*l.*, it will be invested, on request (without an order), in Government securities (*b*), and accruing dividends, when they amount to 10*l.* will be invested: (*see* S. C. F. Rules, r. 73.)

Where the legacy, or share of residue, consists of cash, the direction for payment in will be given on production to the Chancery Pay Office of the Inland Revenue certificate of payment of duty: (*see* Dan. 2200.) Where it is in stock, an order, usually made in chambers, on *ex parte* summons, is necessary: (Dan. 2200.) The summons will be entitled in the matter of the Act, 36 Geo. 3, c. 52, and of A. B., an infant, or of C. D., a person beyond seas, as the case may be.

Payment out.

The application for payment out may be made in cases within this sub-section by O. S., or where an order has already been made, by ordinary summons (*see* Dan. F., p. 938, note *x*.) The application will be supported by an affidavit of the identity of the applicant with the person to whose account the fund is standing; and if the fund was paid in by reason of his infancy, it must, on the application to pay it out, be shown that he was of full age, but no evidence of the legacy duty having been paid need be produced: (Dan. 2201, Wms. Petitions, 46.)

(5.) Applications under 10 & 11 Vict. c. 96, and 12 & 13 Vict. c. 74 (the Trustee Relief Acts) in all cases where the money or securities in court do not exceed 1000*l.*, or 1000*l.* nominal value.

The first application under this sub-rule is by originating summons.

(*a*) For text of sect. 32 of Act, *see* Wms. Exs., Part III., Book III., cap. iv., s. 5; *Ib.*, Book V., 7th edit., pp. 1407, 1578, 8th edit., 1413; Chitty Stat., vol. 2, p. 947; Morgan, p. 51.

(*b*) The provision in 36 Geo. 3, c. 52, s. 32, which required investment in consols, and certificate, is repealed by Chancery Funds Act, 1872.

Subsequent applications are by ordinary summons : (*see* Dan. F., p. 889, note p.) For forms *see* Dan. F. 2053.

For texts of these Acts *see* Lewin on Trusts (Appendix) and Morgan, p. 50.

It is presumed that in complicated applications for payment out under these Acts, a petition may be presented notwithstanding this rule. For a petition has frequently been allowed in applications for payment out of money paid in under the L. C. C. Acts, and as Mr. Justice Chitty stated, in *Ex parte Maidstone and Ashford Railway Company* (25 Ch. Div. 168, 172; 49 L. T. Rep. N. S. 777), "There is no distinction to be drawn between the nature of an application for payment out under the L. C. C. Act, and of a similar application under any other of the Acts specially mentioned."

When a fund paid into court under the Trustee Relief Act, 1847, exceeds 1000*l.*, and there has been no prior application in the matter of the fund, a petition, and not a summons, is the proper mode of applying, under Order XLVI., rr. 12 and 13, Rules of Court, 1883, for a stop-order on the fund so paid in : (*Re Toogood*, 56 L. T. Rep. N. S. 703.) This follows in effect *Day's Trusts* (49 L. T. Rep. N. S. 499), which was decided upon the older rules, which made 300*l.* the limit of value. It was admitted by counsel in that case that subsequent orders might be made on summons.

Trustees who needlessly pay money into court may be deprived of their costs : (Dan. 2080.)

Trustees ought not to pay in under this Act if the only difficulty is infancy, for in such case they can pay in under the Legacy Duty Act.

So also they ought not to pay money into court when the only question with reference to it can be decided upon originating summons : (*Re Giles*, 55 L. J. 695, Ch. ; 34 W. R. 712 ; but, *see Re Parker's Will Trusts*, 60 L. T. Rep. N. S. 83 ; 39 Ch. Div. 303 ; 58 L. J. 23, Ch. ; 37 W. R. 313, C. A.)

In *Re Giles* it was held by Mr. Justice Kay that where a difficulty arose as to who were entitled as next of kin to shares of residue, and the trustees paid such shares into court under the Trustee Relief Act, the trustees were wrong in so doing, as their proper course would have been to take out an originating summons under Order LV. ; whereupon an inquiry as to the next of kin would have been directed. His Lordship said that, had Order LV. been longer in operation, he should have made the trustees personally pay the costs of payment in, which were about 21*l.* We cite a portion of the judgment as indicating the duty of trustees in cases of not infrequent occurrence : "A case may be imagined where the residue

is divisible into twelve shares, and one of the shares lapses. Are the persons entitled to the other eleven shares to wait until a very difficult inquiry as to the next of kin entitled to the twelfth share is worked out? But then I think the answer to that is simple. They need not wait. It is easy enough for the trustees to ascertain approximately the amount of the shares, and to set apart a fund to answer and pay the costs of ascertaining the next of kin; or if any difficulty should arise, then the trustees can come to the court at once, and ask the court to ascertain the fund for them, or tell them what they ought to pay over, or if they ought to pay over anything, and thus act by the direction and under the sanction of the court. It is quite easy to do that by means of an originating summons under Order LV." It was held in this case that the costs of ascertaining the "next of kin" must come out of the general residue. It was held in *Re Potts: Hooley v. Fountain* (W. N. 1884, p. 106) that, when a question arises on the terms of a will, the costs of determining it must come out of the general residue, and that executors must protect themselves by reserving a sum sufficient for payment of costs.

Practice on Payment in.

"All trustees, executors, administrators, or other persons having in their hands any *moneys* belonging to any trust whatsoever, or the major part of them," may, "on filing an affidavit shortly describing the instrument creating the trust according to the best of their knowledge and belief, pay the same" into court: (10 & 11 Vict. c. 96, s. 1).

It is paid to the account of the Paymaster-General "In the matter of the particular trust (describing the same by the names of the parties as accurately as may be for the purpose of distinguishing it):" (*ib.*) Similarly trustees, &c., or the major part of them, having annuities or stock of the Bank of England, or the East India Company, or South Sea Company, or any Government or Parliamentary securities, standing in their names or in the names of deceased persons of whom they are representatives, may transfer the same into court: (*ib.*) No order is needed in cases within this section, where the fund consists of cash, but *secus* in the case of stock: (*see* Morgan, p. 52.)

By 12 & 13 Vict. c. 74, the court may order payment or transfer into court of any *moneys*, stock, funds, or securities, where the major part of trustees, executors, or administrators desire to transfer or pay in, but cannot obtain concurrence of the other or others of them.

Any person who becomes by force of circumstances a trustee, is

a trustee within the meaning of the Act, and so is a mortgagee who has sold under his power: (Dan. 2067.) The scope of the Act has been enlarged by the Judicature Act, 1873, s. 25 (6) authorising payment in conformity with the above Acts in certain cases.

Lodgments
under Trustee
Relief Act.

“When a trustee or other person desires to lodge funds in court in the Chancery Division under the Act 10 & 11 Viet. c. 96, he shall annex to the affidavit to be filed by him pursuant to the said Act a schedule in the same printed form as the lodgment schedule to an order, setting forth:—

- (a.) His own name and address:
- (b.) The amount and description of the funds proposed to be lodged in court:
- (c.) The ledger credit in the matter of the particular trust to which the funds are to be placed:
- (d.) A statement whether legacy or succession duty (if chargeable) or any part thereof has or has not been paid:
- (e.) A statement whether the money or the dividends on the securities so to be lodged in court, and all accumulations of dividends thereon, are desired to be invested in any and what description of Government securities, or whether it is deemed unnecessary so to invest the same.

An office copy of such schedule is to be left with the paymaster:” (S. C. F. Rules, 1886, r. 41.)

When it is stated that investment is desired in any description of Government securities the paymaster shall invest the money if and when it amounts to 40*l.*, or so soon as the dividends amount to 10*l.* If the money is less than 40*l.*, but not less than 10*l.* the paymaster will place it on deposit unless there is a “statement” that it is deemed unnecessary to do so, or notice is given him of an order or intended application to the court: (S. C. Fund Rules, r. 74).

Practice on Payment out.

The summons for payment out will be entitled in the matter of the Trustee Relief Act or Acts (as the case may be), and in the matter of the particular trust. The application will be supported by affidavit, which should take up the history of the trust from the point where the trustee’s affidavit left off and supplying any deficiencies therein. Burial and marriage certificates, &c., should be made exhibits. For cases see Dan. 2065-2085; Wms. Pet. 34.

The application is not usually made by the trustee, but by some person entitled. All persons interested in the money or securities, and the person who paid in, must be served. But where the application is for payment of income merely to a tenant for life, it is not usual to serve the remaindermen: (Dan. 2075, 6; Seton, 498.)

(6.) Applications under 9 & 10 Vict. c. 20 (the Parliamentary Deposits Act), "any other Act relating to parliamentary deposits," for investment, payment of dividends, and payment out of court.

Parliamentary Deposits Act.

The words in inverted commas were added by the Rules of December, 1885.

First applications under this sub-rule are by originating summons: (see Dan. F., p. 900, note *j*.)

For forms see Dan. F. 2077.

It has been pointed out by a judge (79 L. T. 303), that there is no limit of 1000*l.* here; but in *Re Acton and Brentford Railway Company* (78 L. T. 149; Dec. 27, 1884, p. 150), Mr. Justice Chitty held, that where the sums were over 1000*l.*, the application should be by petition as "a safer and more convenient mode of procedure." In the earlier case (79 L. T. 303) a petition was presented, because the money was paid in under other Acts, and that case was prior to the Rules of 1885. But the same principles apply as in the case of applications under the L. C. C. Act; and, though a petition may properly be presented where the case is complicated and the sum considerable, the mere fact that the sum was over 1000*l.* would not render it prudent to proceed by petition.

For text of 9 & 10 Vict. c. 20 and notes thereon, see Browne & Theobald, 338, 2nd edit.

For practice see Dan. 2130.

By the Board of Trade Rules, 1886, under the Tramways Act, 1870 (33 & 34 Vict. c. 78), all applications under such rules to the Supreme Court of Judicature are to be made in a summary manner by summons at chambers.

(7.) Applications for interim and permanent investment, and for payment of dividends under the Lands Clauses Consolidation Act, 1845, and any other Act [passed before Aug. 14, 1855], whereby the purchase money of any property sold is directed to be paid into court.

L. C. C. Act.

This rule must be read with the words in brackets *omitted*, by virtue of No. 20 of the Rules of December, 1885.

First applications under this sub-rule are by originating summons.

For forms see Dan. F. 2093 *et seq.*

In *Re Lands at West Ham, lately belonging to the Carpenters' Company* (76 L. T., Nov. 24, 1883, p. 60), Mr. Justice Kay held, that an application for payment out did not fall within this rule, and

a petition was allowed accordingly. The amount of money with reference to which the application was made was not stated, if it had been less than 1000*l.* the case would apparently have fallen within sub-rule (2).

Although the L. C. C. Act, 1845, contains an express enactment that applications for investment of money paid in under that statute must be made by petition (sect. 70), yet summons is now the proper mode of application for investment under that Act; and where a petition was presented for that purpose, only the costs of a summons were allowed: (*Ex parte Mayor of London*, 25 Ch. Div. 385; 49 L. T. Rep. N. S. 437; 53 L. J. 6, Ch.; 32 W. R. 87.)

Where two sums were in court belonging to a perpetual curacy, one only under 1000*l.*, having been paid in by a railway company, and application for reinvestment was made by petition, the Company was ordered to pay half the costs of petition, such costs not to exceed the costs of a summons adjourned to the judge in chambers: (*Ex parte Perpetual Curate of Bilston*, 37 W. R. 460; W. N. 1889, p. 17).

Petition
allowed.

On an application by petition that funds in court much exceeding 1000*l.*, being purchase money of lands taken under the L. C. C. Act, might be paid to the petitioners by instalments, they undertaking to apply it in building, it was held that this was not really an application for investment under sub-sect. (7), but was a species of payment out, and that a petition was proper. Mr. Justice Kay said it was a case which had slipped in between the rules of the order: (*Ex parte Jesus College, Cambridge*, 50 L. T. Rep. N. S. 583; W. N. 1884, p. 37.)

So where an application was made for payment out of 1330*l.* for building purposes and investment of the balance (770*l.*) in the Three per Cents. the entire sum of 2100*l.* having been paid in under the L. C. C. Act, it was held that the application was properly made by petition: (*Re Hargreave's Trust*; *Ex parte Mayor of Bradford*, 58 L. T. Rep. N. S. 367.) And in *Re Bethlehem* (30 Ch. Div. 541; 53 L. T. Rep. N. S. 558; 54 L. J. 1143, Ch.) Mr. Justice Chitty allowed costs of a petition notwithstanding this sub-rule.

S. L. Act.

In many cases, in consequence of the passing of the Settled Land Act, 1882, money which would have previously been paid into court under the L. C. C. Act, may now be paid to the "trustees of the settlement" under the Settled Land Act. Where there are no such trustees it would frequently be cheaper for the promoters to arrange with the tenant for life for the appointment of such trustees, and so save the expenses of payment into court and the costs of the surveyors required by the L. C. C. Act.

Payment in.

Where, however, the land is not "settled land," or for any reason the procedure under the L. C. C. Act is followed, by sect. 69

thereof, purchase money or compensation payable to persons under disability amounting to 200*l.* or more, is paid into the bank, *i.e.*, the Law Courts Branch of the Bank of England.

The money is placed "in the books at the Pay Office to the credit of *ex parte* the promoters of the undertaking, in the matter of the special Act (citing it), and some words shall be added in each case briefly expressive of the nature of the disability to sell and convey, by reason of which the money shall be so paid in, which particulars shall be stated in the request for the direction for the lodgment : " (S. C. Funds Rules 1886, r. 39.)

By sect. 69 the money deposited is to remain in court until applied to some one or more of the following purposes :— Modes of investment.

- (a.) "In the purchase or redemption of the land tax, or the discharge of any debt or incumbrance affecting the land in respect of which such money shall have been paid, or affecting other lands settled therewith to the same or the like uses, trusts, or purposes; or
- (b.) "In the purchase of other lands to be conveyed, limited, and settled upon the like uses, trusts, and purposes, and in the same manner as the lands, in respect of which such money shall have been paid, stood settled; or
- (c.) "If such money shall be paid in respect of any buildings taken under the authority of this or the special Act, or injured by the proximity of the works, in removing or replacing such buildings, or substituting others in their stead, in such manner as the Court of Chancery shall direct; or
- (d.) "In payment to any party becoming absolutely entitled to such money."

The above modes of application of the money are now extended S. L. Act. by sect. 32 of the Settled Land Act, 1882, under which the money may be invested or applied as capital money under that Act: (see sects. 21 and 25.) The procedure is to be under the L. C. C. Act: (see S. L. A., s. 32, *post*.)

Reading sect. 32 of the Settled Land Act, 1882, and sect. 69 of the Lands Clauses Act together it has been decided that money paid in for corporation or charity lands (*Re Byron's Charity*, 48 L. T. Rep. N. S. 515; 23 Ch. Div. 171; 53 L. J. 152, Ch.; 31 W. R. 517; *Re Bethlehem and Bridewell Hospitals*, 53 L. T. Rep. N. S. 558) or for land belonging to a rector or vicar in right of his benefice (*Ex parte Vicar of Yardley*, not reported) may be invested or applied as capital money under S. L. A. For the cases on S. L. A. see Chapter XVIII. on that Act, *post*.

With reference to buildings, it may be remarked that the general Buildings.

rule is that the money is not paid out of court till the buildings are completed. The usual plan is to make a contract with some builder or other person to execute the work for a specified sum, but where this is impracticable it is suggested that an "outside" estimate should be made, and that the judge should be asked to sanction the expenditure of such sum, not exceeding the estimate, as may be necessary, on the proposed work before it is commenced; the formal order for payment out being made after completion of the work.

Investment

The money is applied upon an order of the Chancery Division, made on petition (or, in cases within these rules, on summons) of "*the party who would have been entitled to the rents and profits of the lands, in respect of which such money shall have been deposited;*" and, until such application, it may, upon like order, be invested in the purchase of Three per Cent. Consols, Three per Cent. Reduced, or Government or real securities, and the income paid to the party entitled to the rents (sect. 70).

The National Debt (Conversion) Act, 1888 (51 Vict. c. 2), made provision for conversion of New Three per Cent. Stock into stock of a lower denomination, and provided facilities for conversion of Consols and Reduced Annuities into stock of a lower denomination. And by sect. 25, sub-sect. (2), of the Act, in any Act passed before the passing of the Act references to any stock liable to be converted or exchanged in pursuance of that Act, may, if the stock is so converted or exchanged, be construed as references to the new stock created under that Act. See also Chapter XX., *post*.

Money paid into court under the Lands Clauses Act, is "cash under the control of the court," within the meaning of 23 & 24 Vict. c. 38, s. 10, and the General Order of Feb. 1, 1861, and may be invested in any of the securities sanctioned by the court: *Ex parte St. John Baptist College, Oxford* (48 L. T. Rep. N. S. 331; 22 Ch. Div. 93; 52 L. J. 268, Ch.) As to what securities are sanctioned by the court, see Chapter XVIII., notes to sect. 21 of S.L.A. 1882, *post*.

The application for investment (whether permanent or interim) is made by the tenant for life, or party who would have been entitled to the rents and profits of the land, and is served on the promoters. In both cases an affidavit of title in accordance with Order LII., r. 18, is required. That Order is as follows:

Affidavit of Title.

"In the case of applications under Acts of Parliament directing the purchase money of any property sold to be paid into court, any persons claiming to be entitled to the money so paid in, must make an affidavit not only verifying their title but also stating that they are not aware of any right in any other person, or of any claim made by any other person, to the sum claimed or to any part thereof, or, if the petitioners are aware of any such right or

claim, they must in such affidavit state or refer to and except the same."

If possible this affidavit must be made by the claimant, but where this is impracticable through illness or incapacity, an affidavit by his solicitor or trustee has been taken instead: (see *Dan.* 2147.) In case of a large public body an affidavit of title is not required: *Re Magdalen College, Oxford* (42 L. T. Rep. N. S. 822; W. N. 1880, p. 150), but see *Re Byron's Charity* (W. N. 1883, p. 67), reported on other points in 48 L. T. Rep. N. S. 515; 23 Ch. Div. 171.

When the petition or summons is for investment in land, it need not be served on the remainderman; but where the money is to be spent in erecting buildings or other improvements, it would seem that the remainderman should be served or his consent be obtained: (*Re Leigh*, 25 L. T. Rep. N. S. 644; L. Rep. 6 Ch. App. 887; 40 L. J. 687, Ch.; 19 W. R. 1105; and *Seton on Decrees*, 1424. But see *Re Aldred's Estate*, 46 L. T. Rep. N. S. 379; 21 Ch. Div. 228; 51 L. J. 942, Ch.; 30 W. R. 777, and *Re Earl De Grey's Entailed Estate*, W. N. Dec. 17, 1887, p. 241; 84 L. T. 116.)

Purchase money or compensation, if not exceeding 200*l.*, may be paid to trustees, to be applied without order as if paid into court (sect. 71); and if not exceeding 20*l.* may be paid to the party entitled to the rents and profits for his own use (sect. 72).

Compensation exceeding 20*l.*, payable to tenant for life under contract, is to be paid into the bank or to trustees as aforesaid; but the court or trustees may allot him a portion as compensation for inconvenience, &c. (sect. 73).

It would appear that in an application under this section the remainderman should be served or be a co-petitioner (*Re Strathmore*, 18 Eq. 339; *Re Collis*, 14 L. T. Rep. N. S. 352; W. N. 1866, p. 167); but see *Re Earl of Berkeley's Will*, L. Rep. 10 Ch. App. 56; 31 L. T. Rep. N. S. 531; 44 L. J. 3, Ch.; 23 W. R. 195.

The L. C. C. Act (s. 80) provides that the costs in case of money deposited in the bank "under the provisions of this or the special Act, or an Act incorporated therewith," shall be paid by the promoters, except in cases of certain wilful refusal or neglect, on the part of the landowner, and except costs occasioned by "adverse litigation." Also the costs of only one application for re-investment in land is allowed, unless it appears to the court that it is for the benefit of the parties interested in the moneys that the same should be invested in purchase of lands in different sums and at different times.

The recent decision of the Court of Appeal in *Re Mills* (55 L. T. Rep. N. S. 465; 34 Ch. Div. 24; 56 L. J. 60, Ch.; 35 W. R. 65),

to the effect that the Judicature Acts and Rules do not enable the court to order costs to be paid by persons who before the Acts came into operation could not have been ordered to pay them, renders the cases which show when sect. 80 of the L. C. C. Act is to be deemed incorporated with the special Act of considerably greater importance than formerly. For now the doctrine which was understood to have been laid down in *Ex parte The Mercer's Company*, 10 Ch. Div. 481, that it was immaterial to consider whether any statute passed before the Judicature Acts made any express provision as to the costs of particular proceedings, must be considered overruled.

The tendency of the decisions under this section is to put a restrictive construction upon the words "adverse litigation." Thus the promoters are liable to pay the costs occasioned by administration or similar proceedings; class inquiries which are necessary for distribution of the fund; costs of dispute between tenant for life and remainderman as to how much of the fund belonged to each; and of inquiry as to what is due on a mortgage (*Eden v. Thompson*, 2 H. & M. 6; *Askew v. Woodhead*, 14 Ch. Div. 27; 42 L. T. Rep. N. S. 567; 49 L. J. 320, Ch.; 28 W. R. 874; *Re Bareham*, 17 Ch. Div. 329; 29 W. R. 520; but see *Ex parte Great Western Railway Company*; *Re Gough's Trusts* (49 L. T. Rep. N. S. 495; 24 Ch. Div. 569; 32 W. R. 147). (a)

Trustee Acts.

(8.) Applications under the Trustee Acts 1850 and 1852 (b) in all cases where a judgment or order has been given or made for the sale, conveyance, or transfer of any stock, or of any hereditaments, corporeal or incorporeal, of any tenure or description, whatever may be the estate or interest therein.

These applications are by ordinary summons. For forms, see Dan. F. 1340 and 2067.

It will be observed that the class of vesting orders obtainable under this sub-rule in chambers is very limited; but where a petition has been presented under the Trustee Act, 1850, the judge has power to direct particular portions of the matters before him to be disposed of in chambers. Thus where an order had been made on petition to appoint new trustees, with liberty to apply at chambers for an order to vest the trust estate in them when appointed, and a subse-

(a) The foregoing is but a bare outline of the practice under the Lands Clauses Act. For fuller information, see Morgan, 24-48; Dan. 2137-2171; Seton, 1415-1450.

(b) 13 & 14 Vict. c. 60; 15 & 16 Vict. c. 55.

quent order was made in chambers appointing the new trustees, and declaring that the right to call for a transfer of, and to transfer into their own names, a sum of India Four per Cent. Stock, "may" vest in the new trustees, it was held that the judge had jurisdiction to make the order on summons in chambers: (*Re Tweedy*, 52 L. T. Rep. N. S. 65; 28 Ch. Div. 529; 54 L. J. 331, Ch.; 33 W. R. 313; Ct. of App.) In this case Fry, L.J. said it was very desirable that the matters which require consideration "should in the first instance come before judges with the assistance of counsel" (52 L. T. Rep. N. S. 67); and see *Re Allen*; *Simes v. S.*, *post*, p. 83; and Chapter X. on "Appointment of New Trustees," *post*.

For text of the Trustee Acts see Lewin on Trusts, 8th edit.. Appendix Nos. 3 and 4; Morgan, p. 61-94.

(9.) Applications on behalf of infants under 1 Will. 4, *Infants*. c. 65, ss. 12, 16, and 17, where the infant is a ward of court, or the administration of the estate of the infant, or the maintenance of the infant is under the direction of the court.

These applications are by ordinary summons, as the court is already seised of the matter.

For forms see Dan. F. 2156.

By this Act (1 Will. 4, c. 65) the court may sanction:

- (a.) Surrender by infant tenant of his lease and acceptance of new lease (sect. 12, Dan. 2203). This applies to a case where the infant is only beneficially entitled, the legal estate being in a trustee: (*Re Griffiths*, 53 L. T. Rep. N. S. 262; 29 Ch. Div. 248.)
- (b.) Acceptance by infant landlord of a surrender of a renewable lease and execution of a new lease (sect. 16, Dan. 2205).
- (c.) Lease of infant's land, including a mining lease (sect. 17, Dan. 2206).

For cases and practice, see Dan. 2203-2209; Seton, 742-745.

These provisions are of less consequence than formerly by reason of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 60, which enables "trustees of the settlement" to exercise the statutory powers of a "tenant for life," who is an infant; and if there are no such trustees authorises the court to appoint a person to exercise such statutory powers; and by reason of the joint effect of sects. 59-60 of the same Act, which together enable the court to appoint a person to act on behalf of an infant absolutely entitled as though he were a tenant for life.

And see sect. 41 of the Conveyancing Act, 1881, and the note by Messrs. Wolstenholme and Turner thereon.

Infants'
Settlements.

(10.) Applications under 18 & 19 Vict. c. 43, for the settlement of any property of any infant on marriage.

These applications are by Originating Summons, unless the infant is a ward of court.

For forms see Dan. F. 1403.

This Act enables infants, males aged twenty, and females seventeen, to make binding settlements with the sanction of the court.

The application is made by the infant or his or her guardian; if there be no guardian the court may require one to be appointed or not as it shall think fit, and it may require any person interested in the property to be served (sect. 3).

For text of Act see Chitty's Statutes, vol. 3, p. 541, and for cases see Dan. 1136; Seton, 765.

The summons will be entitled "In the matter of A. B., an infant, by C. D., his [or her] next friend [or guardian], and in the matter of the Act 18 & 19 Vict. c. 43," intituled "An Act to enable infants, with the approbation of the Court of Chancery, to make binding settlements of their real and personal estate on marriage:" (see Dan. F., p. 597.)

As to the necessary evidence see rule 26 of this order, *post*, p. 104.

The initiative as to the terms of settlement comes from the parties or their friends. If the proposals are approved, directions are given for preparation of the settlement, sometimes the conveyancing counsel to the court is employed, and sometimes this is dispensed with.

In *Re Sampson and Wall, Infants* (50 L. T. Rep. N. S. 435; 25 Ch. Div. 482; 32 W. R. 617, C. A.), it was held that under this Act (18 & 19 Vict. c. 43) a settlement of an infant's property may be made on the occasion of his or her marriage after the marriage has taken place. This was followed in *Re Phillips* (56 L. T. Rep. N. S. 144).

The same Act has removed the disability of infancy only, so that in a case not falling within 20 & 21 Vict. c. 57, or the M. W. P. Acts, a post-nuptial settlement by a female ward of court of her reversionary interest in personalty will not be binding, or deprive her of her right by survivorship, if the interest does not fall into possession during the coverture: (see *Buckmaster v. Buckmaster*, 56 L. T. Rep. N. S. 795; 35 Ch. Div. 21, C. A.; and reported as *Seaton v. Seaton*, 13 App. Cas. 61, H. of L.; 58 L. T. Rep. N. S. 565.)

But the House of Lords declined to decide whether the Act applied to a post-nuptial settlement, or whether *Re Sampson and Wall* (*ubi sup.*) was rightly decided on the above point.

In *Mills v. Fox* (57 L. T. Rep. N. S. 792; 37 Ch. Div. 153) it was held that an infant was bound by a misstatement of fact made in the proposals for settlement on her behalf.

In *De Stacpoole v. De Stacpoole* (58 L. T. Rep. N. S. 382; 37 Ch. Div. 139) the costs of all parties to the settlement (including the costs of the husband) were ordered to be paid out of the corpus of the funds which were to be transferred to the trustees.

For cases and practice see Dan. 1136; Seton, 765; Davidson's Settlements, 3rd ed., Appendix, pp. 651, 653; Vaisey on Settlements, 62.

As to the form of settlement sanctioned, see Davidson's Settlements, 3rd edit., p. 891 *et seq.*; Vaisey on Settlements, "Precedents," 159.

11. Applications under the Copyhold Acts respecting any securities or money in court. Notice of any such application is not to be given to the Copyhold Commissioners, unless the judge shall so direct.

First applications under this sub-rule are by originating summons.

For forms see Dan. F. 2166.

In certain cases, as where the lord of the manor is under disability, the consideration money for enfranchisement is payable into court: (see S. G. Funds Rules, 1886, rr. 30 and 40.)

By the Settled Land Act, 1882, s. 48, the old "Copyhold Commissioners," in common with the Inclosure Commissioners and the Tithe Commissioners, became "the Land Commissioners for England." Their address is 3, St. James's-square, and a courteous public body they are.

As to these Acts, see Dan. 2212-2215; Seton, 1467-1470.

An important amending Act was passed in 1887 (50 & 51 Viet. c. 73): see Brown's Copyhold Enfranchisement Acts, 1888.

12. Applications as to the guardianship and maintenance or advancement of infants.

Guardians—
Maintenance
—Advancement.

Guardianship

For forms see Appendix III., *post*, and Dan. F. 1371, 1386, 1389.

An ordinary application for the appointment of a guardian of the

person or estate of an infant where no action is pending, or where the infant is not a party to the action is by Originating Summons; but where the infant is a party to such action, then by ordinary summons: (see Dan. F., p. 580, note c.) For the evidence required see Order LV., r. 25, *post*, p. 104.

For the practice and cases see Dan. 1113; Seton, 718; Simpson on Infants, 223; and notes to *Eyre v. Countess of Shaftesbury* (2 W. & T. L. C. 693; 6th edit.).

The law relating to guardianship and custody of infants was considerably altered by the Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27). The rights of the mother were much more fully recognised than heretofore, both with reference to herself becoming guardian (sect. 2) and appointing a guardian (sect. 3). Also she may apply to the court, without next friend, for order as to custody of and access to the infant (sect. 5). The guardian appointed under this Act is to have the same powers over the estate and the person, or over the estate as the case may be, as a guardian appointed by will or otherwise has under 12 Car. 2, c. 24, or otherwise (sect. 4). And the court may remove a testamentary guardian, or guardian under this Act (sect. 6). Applications under this Act are to be made in such manner as may be prescribed by rules of court.

In pursuance of power contained in the Act, rules thereunder were issued on Dec. 17, 1887. They may be cited as "The Rules of the Supreme Court, Guardianship of Infants." A copy of them will be found in Appendix I. hereto, *post*, also in W. N. of Feb. 4, 1888. Rule 2 is as follows:

"Any application under the Act may be made as follows:

"(a.) Where there is pending any action, or other proceeding, by reason whereof the infant is a ward of court, then by a summons in such action or proceeding, and in the matter of the infant.

"(b.) Where there is not pending any such action, or other proceeding as aforesaid, then by an originating summons in the matter of the infant."

In *Re Witten* (57 L. T. Rep. N. S. 336; W. N. 1887, 167), on petition by a mother under sect. 5 of this Act to obtain the custody of her infant son, aged ten, on the ground of misconduct of the father, the court made the order without fixing any limit of age during which the infant might remain in custody of the mother.

For orders under sect. 7 see *Skinner v. Skinner* (13 P. D. 91); and *Robinson v. Robinson* (57 L. T. Rep. N. S. 118). In *Re Scanlan* (40 Ch. Div. 200, 59 L. T. Rep. N. S. 599), it was

decided that this Act had not introduced any change in the rule that children ought to be brought up in the religion of their father.

Maintenance.

For forms see Appendix III., *post*, and Dan. F. 1386.

An application for maintenance is made by ordinary summons if an action or matter affecting the infant is pending, otherwise by Originating Summons. The summons should be served on the persons having control of or being interested in the fund out of which maintenance is to be provided: (see Dan. 1126.)

It must be borne in mind that, if an order is sought adversely to a third party, it is not sufficient to entitle the summons in the matter of the infant: (see *Re Lofthouse, an Infant*, 53 L. T. Rep. N. S. 174; 29 Ch. Div. 921, 932; 54 L. J. 1087, Ch., C. A.) In such a case the infant should be made plaintiff by next friend, and the adverse party defendant.

For the evidence required in support of the application see Order LV. r. 25, *post*, p. 104. And for practice generally see Dan. 1122; Dan. F., p. 586.

Since the Conveyancing Act, 1881 (44 & 45 Vict. c. 41) s. 43, applications to the court for maintenance orders are presumably less frequent than formerly. Under that section trustees may apply the income of an infant's property for his maintenance, without any application to the court. An Originating Summons would be a proper mode of obtaining the opinion of the court as to whether sect. 43 applied to a particular case: (see *Re Dickson*; *Hill v. Grant*, 52 L. T. Rep. N. S. 707; 29 Ch. Div. 331; 54 L. J. 510, Ch.)

The following list of cases upon that section may be useful:

Judkin's Trusts (50 L. T. Rep. N. S. 200; 25 Ch. Div. 743); *Thatcher's Trusts* (26 Ch. Div. 426); *Re Dickson*; *Hill v. Grant*, 52 L. T. Rep. N. S. 707; 29 Ch. Div. 331). And see *Re Medlock*; *Ruffle v. Medlock* (54 L. T. Rep. N. S. 828; W. N. 1886, p. 111).

For cases on the prior Act, 23 & 24 Vict. c. 145 (Lord Cranworth's), see *Re Cotton* (33 L. T. Rep. N. S. 720; 1 Ch. Div. 232; and *Re George* (37 L. T. Rep. N. S. 204; 5 Ch. Div. 839), which are discussed in 78 L. T. 110 and 83 L. T. 75; and in *Re Buckley's Trusts* (48 L. T. Rep. N. S. 109; 22 Ch. Div. 583).

As to maintenance out of accumulations, see also *Re Collins*; *Collins v. Collins* (55 L. T. Rep. N. S. 21; 32 Ch. Div. 229; *Re Alford*; *Hunt v. Parry*, 54 L. T. Rep. N. S. 674; 32 Ch. Div. 383).

Advancement.

For forms, see Appendix III., *post*, and Dan. F. 1389.

In a petition for payment to an infant of certain sums by way of advancement, out of a sum exceeding 1000*l.* in court, the sum having been paid in under the Legacy Duty Act (36 Geo. 3, c. 52), a question arose whether the proper procedure in the matter was by summons in chambers, as being an application for advancement of an infant, or by petition, having regard to the Rules of the Supreme Court 1883, Order LV., r. 2, sub-sects. 4, 12, and to the fact that the sum in court exceeded 1000*l.* Held, that sub-sect. 4 must be treated as an extension of the practice under Consolidated Order XXXV., r. 1, and consequently the present matter was beyond the jurisdiction of chambers, and that the proper procedure was by petition and not by summons in chambers; and that the effect of sub-sect. 12 was to extend the jurisdiction of chambers so as to cover all cases which were not expressly excepted, like the present one, by sub-sect. 4: (*Re Coore*, 76 L. T. 61, Chitty, J., Nov. 10, 1883; W. N. 1883, p. 169.)

As to the powers of trustees under an advancement clause, see *Lowther v. Bentinck* (31 L. T. Rep. N. S. 719; 19 Eq. 166; 44 L. J. N. S. 197, Ch.); *Re Breed's Will* (1 Ch. Div. 226).

It is a power to be exercised as a rule in the early life of its object: (*Re Aldridge*; *Abram v. Aldridge*, 54 L. T. Rep. N. S. 827.)

As to the practice generally see Dan. 1127.

Management. (13.) Applications connected with the management of property.

As to management of infants' property see Dan. 1128-1131; Seton, 733-744.

See also Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 42.

Sales. (14.) Applications for or relating to the sale by auction, or private contract of property, and as to the manner in which the sale is to be conducted, and for payment into court and investment of the purchase money.

As a rule the applications here referred to would be by ordinary summons.

For forms see Dan. F. 1286 and 1329.

As to sales by the court, see Dan. 1071; Seton, 1391-1413, 1684-1685 (*add.*).

Note the enlarged powers given to the court by Order LI., r. 1 A, R. S. C., Dec. 1885, which is as follows: "In all cases where a sale, mortgage, partition, or exchange is ordered, the court or a judge shall have power, in addition to the powers already existing,

with a view to avoiding expense or delay, or for other good reason, to authorise the same to be carried out, either as at present—(a) by laying proposals before the judge in chambers for his sanction; or (b) by proceedings altogether out of court, any moneys produced thereby being paid into court or to trustees, or otherwise dealt with as the judge in chambers may order.”

And by Order LI., r. 3 A, no order for the payment of purchase money into court shall be necessary, but a direction for that purpose signed by the chief clerk shall be sufficient authority for the Paymaster-General to receive the money.

Kay, J.: “Whenever I make an order for sale out of court, I require three things—namely, that the reserved bid should be fixed by the chief clerk, that the auctioneer’s remuneration should be similarly fixed, and that the purchase money should be paid directly into court. The directions as to the auctioneer’s remuneration, as well as the reserved bid, must be mentioned in the order:” (*Pitt v. White*, 57 L. T. Rep. N. S. 650; W. N. 1887, p. 217; followed in *Re Stedman*; *Coombe v. Vincent*, 58 L. T. Rep. N. S. 709; W. N. 1888, p. 119.)

(15.) All applications under 6 & 7 Vict. c. 73 (not Taxation. being applications for orders of course), for the taxation and delivery of bills of costs, and for the delivery by any solicitor of deeds, documents, and papers.

These applications will be by originating summons.

For forms, see Dan. F. 2024.

Where a petition was needlessly presented, only costs of a summons were allowed: (*Re Kellock*, 56 L. T. Rep. N. S. 887; 35 W. R. 695.)

The above-mentioned Act is the Solicitors Act, 1843. A solicitor cannot bring action for costs until one calendar month after sending in signed bill. The party chargeable may during the month get an order of course to tax the bill. After the month either party may obtain a reference to taxation, but not after verdict in any action for the solicitor’s demand, or after twelve months after delivery of the bill, except under “special circumstances.”

Under special circumstances taxation may be ordered after payment, provided the application to tax be made within twelve calendar months after payment: (sect. 41; Dan. 1999.)

It is apprehended that by “orders of course” in the above rule is meant orders usually obtained on petition of course; *i.e.*, where taxation is applied for (a) within one calendar month after delivery; or (b) after that time, but within twelve months after delivery of the bill, and before verdict for the bill, or payment.

Where an agreement has been made for the remuneration of a solicitor (as may be done under the Attorneys and Solicitors Act, 1870, 33 & 34 Vict. c. 28, or the Solicitors' Remuneration Act, 1881, 44 & 45 Vict. c. 44), if the solicitor alleges that the remuneration was for non-professional work, the party chargeable cannot obtain the common *ex parte* order for taxation. The Solicitors' Remuneration Act, 1881, s. 8, has not altered the practice on this point: (*Re Inderwick*, 50 L. T. Rep. N. S. 221; 25 Ch. Div. 279.)

The question of retainer may be raised on the common order to tax as to particular items, but not as to the whole bill: (*Re Herbert*, 56 L. T. Rep. N. S. 522; 34 Ch. Div. 504.)

But where a solicitor obtains the common *ex parte* order the client is not bound by the allegation of retainer contained in the petition, and therefore may object to every item in the bill. Consequently it is no objection to the common order, when obtained by a solicitor, that he knew that the client disputed his retainer as to the whole bill: (*Re Jones, a Solicitor*, 57 L. T. Rep. N. S. 26; 36 Ch. Div. 105.)

As to what is delivery of bill, see *Re Thompson* (30 Ch. Div. 441; 53 L. T. Rep. N. S. 479).

As to the jurisdiction of the Queen's Bench Division to order delivery of bill, see *Re Pollard* (20 Q. B. Div. 656, C. A.). As to power of the court under its general jurisdiction to tax part of a bill, see *Re Johnson and Weatherall* (37 Ch. Div. 433; 58 L. T. Rep. N. S. 692).

As to special circumstances justifying taxation after twelve months from delivery of bill, see *Seton*, 610; *Dan.* 2021; *Re Norman*, (16 Q. B. Div. 673; 54 L. T. Rep. N. S. 143; 55 L. J. 202, Q. B.; 34 W. R. 213, C. A.); *Re Pybus* (35 Ch. Div. 568; 57 L. T. Rep. N. S. 362). As to special circumstances justifying taxation after payment, see *Re Boycott* (29 Ch. Div. 571; 52 L. T. Rep. N. S. 482, C. A.); *Re Lacey* (25 Ch. Div. 301; 49 L. T. Rep. N. S. 755, C. A.); *Re Elwes and Turner* (W. N. 1888, p. 68); *Re Griffith Jones* (50 L. T. Rep. N. S. 434; 53 L. J. 965, Ch.; 32 W. R. 350, C. A.); *Re Chowne* (52 L. T. Rep. N. S. 75, C. A.); *Re W. Eley* (57 L. T. Rep. N. S. 253; 37 Ch. Div. 40); *Re Munns and Longden* (50 L. T. Rep. N. S. 356; 32 W. R. 657; W. N. 1884, p. 117); *Re Norman* (16 Q. B. Div. 673, *ubi sup.*).

What is payment, see *Re Griffith Jones* (*ubi sup.*); *Re Stogdon* (W. N. 1887, p. 9; 56 L. T. Rep. N. S. 355; 56 L. J. 425, Ch.; 51 J. P. 565).

A judge may allow a solicitor to commence action within the month where the party chargeable is likely to quit England, become

bankrupt, or take other steps likely to defeat or delay the solicitor's claim: (38 & 39 Vict. c. 79, s. 2; Dan. 1997.)

Taxation may be ordered on application of a person liable to pay or who shall have paid the bill, although he is not the person chargeable: (6 & 7 Vict. c. 73, s. 38; Dan. 1997, 2019.)

Thus a mortgagor or lessee who pays for the lease may obtain taxation, also where a trustee, executor, or administrator has become chargeable, taxation may be ordered (if the judge think fit) on the application of a party interested in the property out of which the bill may be paid: (sect. 39; Dan. 1998, 2019.) See *Re Chowne* (52 L. T. Rep. N. S. 75).

Applications under this Act to refer a bill to be taxed and settled, and for the delivery of such bill and for the delivery up of deeds, documents, and papers shall be made in the matter of such solicitor (sect. 43). It need not be entitled in the matter of the Act: (Dan. 2005.) (a)

(16.) Applications for orders on the further consideration of any cause or matter where the order to be made is for the distribution of an insolvent estate, or for the distribution of the estate of an intestate, or for the distribution of a fund among creditors or debenture holders. Further consideration.

These applications will be by ordinary summons.

For form of summons and minutes on further consideration where the estate is insolvent, see Dan. F. 1432 and 1433.

Where there is a question to be argued which will probably have to come into court, a plaintiff is justified in bringing on the further consideration of an action to administer an insolvent estate in court notwithstanding this rule, as expense is thereby saved: (see *Re Barber*; *Burgess v. Vinnicome*, 31 Ch. Div. 665.)

As to setting down causes on further consideration see Order XXXVI., r. 21.

(17.) Applications for time to plead, for leave to amend pleadings, for discovery and production of documents, and generally all applications relating to the conduct of any cause or matter.

These applications must obviously be made by ordinary summons.

(a) The foregoing is but a slight outline of the practice as to taxation of costs. For fuller information, see Dan. 1993; Morgan, 1; Seton, 604; Cordery on Solicitors, 2nd ed., p. 251 *et seq.*

General
power.

(18.) Such other matters as the judge may think fit to dispose of at Chambers.

In *Re Evan Evans* (54 L. T. Rep. N. S. 527) it was argued that the court could order payment out of a sum less than 1000*l.*, part of a sum originally exceeding 1000*l.*, under this general rule, but Mr. Justice Kay, declined to accede to this view, stating that such view of the rule would justify the court in abrogating all the previous sub-rules of this order. And see *Re Tweedy* (52 L. T. Rep. N. S. 63, 67, *ante*, p. 69.

not competent for an applicant on an originating summons
to ask for an administration then by court an order made
on basis of fact, a signature showing his willful default.

Power Intm 91 A C 202

CHAPTER VIII.

ADMINISTRATIONS AND TRUSTS.—[FORE- CLOSURE AND REDEMPTION.]

ORDER LV., R.S.C. 1883, RR. 3-19.

3. The executors or administrators of a deceased person or any of them, and the trustees under any deed or instrument or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, next of kin, or heir-at-law or customary heir of a deceased person, or as *cestui que trust* under the trust of any deed or instrument, or as claiming by assignment or otherwise under any such creditor or other person as aforesaid, may take out, as of course, an Originating Summons returnable in the chambers of a judge of the Chancery Division for such relief of the nature or kind following, as may by the summons be specified and as the circumstances of the case may require (that is to say), the determination, without an administration of the estate or trust, of any of the following questions or matters :—

Administra-
tions and
trusts.

- (a.) Any question affecting the rights or interests of the person claiming to be creditor, devisee, legatee, next of kin, or heir-at-law, or *cestui que trust* :
- (b.) the ascertainment of any class of creditors, legatees, devisees, next of kin, or others :
- (c.) the furnishing of any particular accounts by the executors or administrators or trustees, and the vouching (when necessary) of such accounts :
- (d.) the payment into court of any money in the

hands of the executors or administrators or trustees :

- (e.) directing the executors or administrators or trustees to do or abstain from doing any particular act in their character as such executors or administrators or trustees :
- (f.) the approval of any sale, purchase, compromise, or other transaction :
- (g.) the determination of any question arising in the administration of the estate or trust.

For forms of Originating Summons under this rule and rule 4 see Appendix III., *post*.

The words in brackets in the heading of this chapter were added in Dec. 1885, when the scope of the rules was enlarged accordingly.

Rule 3. The power given by this rule of obtaining relief without administration has been widely exercised. Numerous wills have been construed, and difficult points of law have been determined; declarations as to rights made, and directions as to duty given.

As relief is usually sought under several of the sub-sections of this rule, and as the reported decisions upon particular sub-sections as distinguished from the whole rule are rare, it has not been considered necessary to attempt to classify the cases under any particular sub-section.

Advantages of
Originating
Summons

It is to be inferred, from the following remarks of Mr. Justice Stirling, in *Re Partington* ; *Partington v. Allen* (57 L. T. Rep. N. S. 660), that the court is disposed to encourage applications by trustees under this rule : " There are certainly a number of cases from which I do not desire to dissent in any way, in which it has been held that the advice of a solicitor or the opinion of counsel does not indemnify trustees. If a trustee is distributing a fund, and any difficulty arises as to the persons who may be entitled, he can have recourse to the court, and he would be completely indemnified by the order of the court. If, under those circumstances, he chooses to rely on the advice of a solicitor or the opinion of counsel, he gets no indemnity, and he must take the consequences of so doing. The same remark applies to many other acts of trustees, and the facilities which are now given by the present practice to trustees, for coming and obtaining the opinion of the court as to matters in the administration of the trust, are so great that, in that class of cases, the rule to which I have referred is not in the least likely to be relaxed."

A question which arose early under this and the following rule was how far relief under them could be obtained *against* trustees personally. See the cases on this point under rule 4.

It is often advisable to ask by the summons not only specific questions under rule 3, but also, if necessary, for general administration under rule 4, as that enlarges the jurisdiction of the court upon the summons.

The difficulty or importance of a case is no reason for refusing to deal with it on Originating Summons. But in heavy matters the court would probably look indulgently upon proceedings commenced by writ or special case. When summons.

In *Bond v. Walford* (54 L. T. Rep. N. S. 672; 32 Ch. Div. 238; 55 L. J. 667, Ch.), which was an action for cancelling a settlement, where there was considerable complication, Mr. Justice Pearson said, "I wish to add that I think this was not a proper case for an Originating Summons, and the parties were justified in bringing an action."

Rule 3 is only intended for decision of such questions as would have arisen on administration of the trusts of a will or settlement.

The court cannot, under such rule, decide a mere legal question between heir and devisee, which would not before the making of Order LV. have required an administration suit, and serving the executor, who is not a necessary party, will not give the court jurisdiction: (*Re Carlyon*; *C. v. C.*, 56 L. T. Rep. N. S. 151; 56 L. J. 219, Ch.; 35 W. R. 155; *Re Davies*, 58 L. T. Rep. N. S. 312; 38 Ch. Div. 210; 57 L. J. 759, Ch.; 36 W. R. 587.) And Mr. Justice Kay held, in *Re Bridge*; *Franks v. Worth* (56 L. T. Rep. N. S. 726; 56 L. J. 779, Ch.; 35 W. R. 663; W. N. 1887, p. 120), that the court had no jurisdiction on an Originating Summons, under rule 3, to determine a question affecting a person claiming adversely to the will of a deceased person, even though he consented to be bound. And see *Re Gladstone*, *post*, p. 86.

"Order LV. is not an order conferring jurisdiction, but merely regulating the mode in which questions are to be brought before the court. If a person, who is served with an Originating Summons in a matter not falling within *a, b, c, d, e, f*, and *g*, of Order LV., objected to the jurisdiction, and did not appear, the court would not go on; but where the party has appeared and has taken the decision of the court, it would be wrong to let him take the objection when the matter comes before the Court of Appeal. Of course, it is open for the judge to say, in any particular case, that the subject-matter is not a proper one to be brought before it on Originating Summons:" (*Re Turcan*, 58 L. J. 101, Ch. Ct. of App.)

Trustees were allowed to advance capital to tenant for life, who

was himself a trustee, to enable him to stock and cultivate a farm which could not be let at a remunerative rent: (*Re Household*; *H. v. H.*, 27 Ch. Div. 553; 51 L. T. Rep. N. S. 319.)

Where an application is made to the court (about a proposed purchase) to exercise the discretion of trustees, the court will act very cautiously: (*Re Walker*; *W. v. W.*, 77 L. T. 268.)

In *Re Garnett*; *Gandy v. Macaulay* (50 L. T. Rep. N. S. 172; on appeal, 31 Ch. Div. 1), the Court set aside a release, but Lord Justice Cotton pointed out that no objection had been urged to this mode of proceeding.

In *Re Ellis*; *Kelson v. Ellis* (59 L. T. Rep. N. S. 924; 37 W. R. 91; W. N. 1888, p. 217), where an Originating Summons was taken out by beneficiaries, asking that, notwithstanding a release which had been executed to the trustees, the trustees might be ordered to render an account, thus in effect claiming to have the release set aside, it was held, by Kay, J., that the case was not one which should be heard on Originating Summons.

In *Re Lofthouse* (53 L. T. Rep. N. S. 174; 29 Ch. Div. 921) the Court of Appeal held that an order for maintenance could not be made contrary to wishes of trustees who claimed to exercise their discretion on a summons entitled merely in the matter of the infant, and said that such order could only be made on action—commenced by writ or Originating Summons.

Neither this Order nor Order LI., r. 1, gives a power of sale where none previously existed, but leave was given to amend the Originating Summons asking for sale, by entitling it under the Settled Land Act, 1882, and a reference to chambers to appoint trustees was directed, so that a sale could be effected: (*Re Robinson*; *Pickard v. Wheeler* (53 L. T. Rep. N. S. 865; 31 Ch. Div. 247; and see *Re Staines*; *Staines v. Staines*, 33 Ch. Div. 172.)

A question of legitimacy was decided on an application for maintenance in *Re Walker* and *Re Jackson* (53 L. T. Rep. N. S. 661).

Although the court could not upon Originating Summons, prior to Order LV., r. 13a, *post*, p. 96, appoint new trustees and make a vesting order under the Trustee Acts (*Re Gill*; *Smith v. G.*, 53 L. T. Rep. N. S. 623; 34 W. R. 134; W. N. 1885, p. 208), yet where an Originating Summons had been taken out under Order LV., rr. 3, 4, for the general administration of an estate, if and so far as was necessary, and (*inter alia*) the appointment of new trustees, and all the persons interested were parties to the application, and an order was made upon the summons in chambers for the appointment of new trustees, and the question was raised whether the court had jurisdiction to make such an order upon an Originating

Summons, the registrar having objected that it had not, relying upon *Re Gill; Smith v. Gill* (53 L. T. Rep. N. S. 623); it was held that that case was distinguishable, the summons in the present case being an action within sect. 100 of the Judicature Act, 1873, and all the parties interested in the appointment being before the court, it could make the order upon the summons under its general jurisdiction: (*Re Allen; Simes v. S.*, 56 L. T. Rep. N. S. 611; 56 L. J. 779, Ch.)

A trustee ought not to pay money into court where the only question at issue can be decided on Originating Summons: (*Re Giles*, 81 L. T. 80; 55 L. J. 695, Ch.) (See page 60 above.) But see *Re Parker's Will Trusts* (60 L. T. Rep. N. S. 83; 39 Ch. Div. 303; 58 L. J. 23, Ch.; 37 W. R. 313.) At the same time it must not be supposed that Originating Summons is always a cheaper mode of proceeding. It will often be cheaper to have an administration action than to take out a large number of Originating Summonses: (see *Re Berridge*, cited in 84 L. T. 148).

In *Re Currey; Gibson v. Way* (54 L. T. Rep. N. S. 665; 32 Ch. Div. 361), with the view of carrying out an agreement of compromise, the Court removed a restraint on anticipation on the property of married women. See also *id.* (No. 2) (56 L. T. Rep. N. S. 80; W. N. 1887, p. 28.) Apparently when application to remove such a restraint is made in a pending action or proceeding, it need not be entitled in the matter of the Conveyancing Act, 1881: (see *Dan. 2315*, and *Re Landfield; Landfield v. Landfield*, 30 W. R. 377.)

Mr. Justice North, in March 1887, referred to the fact that in a certain class of cases the procedure by Originating Summons was not convenient.

Thus where trustees asked by Originating Summons whether they would be justified in postponing sale of a hotel which the testator directed to be sold, he said that, as often happened in cases of this kind, he was placed in great difficulty as to matters with which he should have no difficulty in dealing if he were executing the trusts of the will in an action brought for that purpose. He could not give the trustees the same discretion as he should himself have in such an action. He then only allowed postponement of sale for a very limited time. In another case, on the same day, his Lordship condemned the growing practice of attempting in proceedings of this kind to induce the court to express general opinions upon very insufficient evidence, and to do in fact that which ought not to be done in chambers: (31 Sol. J., March 5, 1887, p. 295.)

Rule 3 (e) of Order LV., only relates to the doing or abstaining Sub sect. (e).

from doing by trustees of some act within the scope of their trusts. And an Originating Summons ought not to be taken out under that rule for the purpose of obtaining a direction to trustees to do or abstain from doing an act which is outside the scope of their trusts: (*Suffolk v. Lawrence*, 32 W. R. 899; W. N. 1884, p. 158.) This was an application by a trustee in bankruptcy of a *cestui que trust*, to compel the trustees of the will to concur in a sale of property under an order of the court in a partition action, and to abstain from putting the estate to the expense of a partition. Mr. Justice Pearson declared that he "was bound to protect the court from Originating Summonses of this description," and dismissed the application with costs.

In an administration action by a beneficiary, asking for the usual accounts and inquiries where the defendants were the executors of the sole trustee of two wills under which the plaintiff claimed, and it was alleged that the deceased trustee had received the rents and furnished no accounts, Mr. Justice Kay declined to make any order such as would render the estate liable for any costs over and above such as could be thrown on the defendants in their capacity of representatives of the deceased trustee, in the event of the action being made necessary by any default on their part, and he directed the plaintiff to make a written application to the defendants to furnish the requisite accounts, when, if they neglected to furnish the same so far as might be in their power, the order asked for would be made at their cost: (*Re Hayter*, 32 W. R. 26.)

Issue of summons under rule 3 is not to affect power of trustees, &c., more than is necessary: (Rule 12; and see *Re Hall*, 51 L. T. Rep. N. S. 901.)

Semble, it is not proper for a joint creditor of partnership firm to take out Originating Summons for administration of estate of deceased partner, but he should bring an action in the ordinary way: (*Re Barnard*; *Edwards v. B.*, 32 Ch. Div. 447; 55 L. T. Rep. N. S. 40; 55 L. J. 935, Ch.; 34 W. R. 782.)

A settlement was approved in *Re Parrot*; *Walter v. P.* (55 L. T. Rep. N. S. 132; 33 Ch. Div. 274), and see *Re Briant*; *Poulter v. Shackel* (39 Ch. Div. 471; 59 L. T. Rep. N. S. 215; 57 L. J. 953, Ch.; 36 W. R. 825.)

Trustees were ordered to produce title deeds in *Re Cowin*; *C. v. Gravett* (33 Ch. Div. 187).

In *Re Medland*; *Eland v. Medland* (86 L. T. 390; W. N. 1889, p. 62), an inquiry was directed what ought to be done with certain mortgages forming part of the trust funds.

In *Elworthy v. Harvey* (60 L. T. Rep. N. S. 30; 37 W. R. 164; W. N. 1888, p. 239), where the plaintiff claimed that it might be

determined whether the defendant was a co-trustee with him, and that a new trustee might be appointed in defendant's place, it was held, that the relief could not have been granted on an Originating Summons. In *Conway v. Fenton* (59 L. T. Rep. N. S. 928; 40 Ch. Div. 512; 58 L. J. 282, Ch.) it was held, that the court could sanction expenditure out of *corpus* of settled trust funds for preserving the value of real property in the same settlement.

The object of Order LV., said Mr. Justice Kekewich in that case, was "to enable trustees, or any person beneficially interested in a settlement or will, to come in a summary mode to the court and obtain the determination of any question, whether of administration or of law, without the necessity of an administration action. But I take it that for all purposes, or almost all purposes, the court is in precisely the same position on hearing an Originating Summons as if it had an administration action properly constituted before it; and that I have precisely the same jurisdiction in an Originating Summons as in an administration action, neither more nor less. Therefore I proceed as if I had an administration now before me."

Trustees of a will, made in America by a domiciled American, applied to the court by Originating Summons as to the construction of the investment clause of the will. The money to be invested was in England, and the trustees were English, but none of the beneficiaries were domiciled in England. Held, that the court had no jurisdiction to make any order: (*Re Howland; Hart v. Vuilleumer*, 86 L. T. March 30, 1889, p. 409.)

Summonses under rule 3, the object of which is to obtain the opinion of the court or a judge upon the construction of a document, or any question of law . . . shall be brought before the judge in person: (see rule 15, *post*, p. 98.)

4. Any of the persons named in the last preceding rule may in like manner apply for and obtain an order for— Administration orders.

- (a.) the administration of the personal estate of the deceased:
- (b.) the administration of the real estate of the deceased:
- (c.) the administration of the trust.

Under 15 & 16 Viet. c. 86, ss. 45 and 47, it was generally considered that a defendant could not be charged with wilful default on summons: (see cases cited at Dan. 993.) And, although the

jurisdiction under this order is wider, having regard to the following decisions, it is suggested that, as a rule, where a defendant is charged with wilful default a writ should be issued.

An administration summons is not a proper proceeding to obtain payment of a disputed debt, when the dispute turns on questions of fact; but when the dispute is only one of law, it ought to be so decided without putting the parties to another proceeding: (*Re Powers*; *Lindsell v. P.*, 53 L. T. Rep. N. S. 647; 30 Ch. Div. 291.)

In *Re Warren*; *Weldon v. Reading* (76 L. T. 460; W. N. 1884, p. 112; 19 L. J. N. C. April, 1884, p. 51) Mr. Justice Kay declined to deal with an application by Originating Summons, whereby it was sought to recover personalty alleged to have been wrongfully paid away by executors by mistake, as an adjourned summons, but directed it to go into the general list.

In *Re Chapman*; *Fardell v. Chapman* (54 L. T. Rep. N. S. 13; W. N. 1886, p. 17) the summons asked (a) that a sum of stock standing in the names of trustees might be transferred into court; (b) that a mortgage deed for securing 1000*l.*, part of the testator's estate, might be deposited in court; (c) that the trustees might be ordered to pay into court 7099*l.* 12*s.* 3*d.*, part of testator's estate improperly used by them; (d) proper accounts; and (e) administration so far as necessary for the purposes aforesaid. Mr. Justice Kay ordered the trustees to pay the moneys into court, to transfer the investments into court, and to deposit the mortgage deed in court; also the usual accounts, administration, and execution of the trusts.

In *Re Gladstone*; *Gladstone v. Blumenthal* (W. N. 1888, p. 185) where an Originating Summons was taken out for the purpose of deciding a point on the construction of a creditor's deed, and the plaintiff, though a beneficiary under the deed, was claiming against it, it was held by Mr. Justice North that there was no jurisdiction to decide the matter on Originating Summons. But apparently the judge expressed an opinion on the construction of the deed.

Where proceedings for administration are commenced by Originating Summons, an application for the appointment of a receiver can be made in the action either in court (by motion) or in chambers (by summons) at any time, whether before or after the trial, or the hearing at chambers, which is equivalent to the trial: (*Re Francke*; *Drake and Co. v. Francke*, 58 L. T. Rep. N. S. 305; W. N. 1887, p. 69.)

In this case proceedings were begun by writ, and on the same day as the writ was issued the plaintiffs applied for and obtained the appointment of a receiver and manager of the business of the

deceased, and a receiver of his residuary personal estate. Notwithstanding this application, Mr. Justice North held that the proceedings should have commenced by Originating Summons, and only allowed costs of an Originating Summons; and see *Gee v. Bell* (56 L. T. Rep. N. S. 305; 35 Ch. Div. 160).

Orders for general administration, or for the execution of a trust are to be made by the judge in person. See rules of Dec., 1885, amending rule 15 of Order LV., *post*, p. 99.

5. The persons to be served with the summons under ^{Whom to} the last two preceding rules in the first instance shall be ^{serve.} the following; (that is to say,)—

A. Where the summons is taken out by an executor or administrator or trustee,—

- (a.) for the determination of any question, under sub-sections (a.), (e.), (f.), or (g.) of rule 3, the persons, or one of the persons, whose rights or interests are sought to be affected :
- (b.) for the determination of any question, under sub-section (b.) of rule 3, any member or alleged member of the class :
- (c.) for the determination of any question, under sub-section (c.) of rule 3, any person interested in taking such accounts ;
- (d.) for the determination of any question, under sub-section (d.) of rule 3, any person interested in such money :
- (e.) for relief under sub-section (a.) of rule 4, the residuary legatees, or next of kin, or some of them :
- (f.) for relief under sub-section (b.) of rule 4, the residuary devisees, or heirs, or some of them :
- (g.) for relief under sub-section (c.) of rule 4, the *cestuis que trust*, or some of them :
- (h.) if there are more than one executor or administrator or trustee, and they do not all concur in taking out the summons, those who do not concur :

- B. Where the summons is taken out by any person other than the executors, administrators, or trustees, the said executors, administrators, or trustees.

It will be observed that in applications by an executor, administrator, or trustee under rule 3, it is only requisite to serve *one* of the beneficiaries, and in similar applications under rule 4 it is only requisite to serve *some* of the beneficiaries. On the other hand, in applications by any person other than the executors, administrators, or trustees, it is only necessary to serve the said executors, administrators, or trustees. But by rule 6, *post*, p. 92, the court or judge may direct such other persons to be served as they or he may think fit.

Parties.

Notwithstanding the language of rule 5 it is not the usual practice of the court to decide questions under this order unless all persons interested are parties to the summons, or are sufficiently represented by such parties.

As already pointed out at pp. 16, 17, under Order XVI., r. 9, in the case of numerous persons having the same interest, the court or judge may make an order authorising one or more of such persons to defend on behalf of all; and under Order XVI., r. 32, where an heir-at-law, or next of kin, or class, are unknown or difficult to ascertain, an order may be made appointing some person or persons to represent such heir-at-law, or next of kin, or class. See *ante*, p. 22.

For the practice to obtain these orders see notes to Order XVI., r. 9, *ante*, p. 16, and to Order XVI., r. 32, *ante*, p. 22; and as to parties generally, *ante*, p. 13 *et seq.*

Where the executors, administrators, or trustees are defendants, the strictly proper course is not to join any other person as defendant *in the first instance*, but to apply in chambers, in the action commenced by the Originating Summons, for directions as to what other persons should be served with the summons: (see *Re Gardiner*; *Jones v. Gardiner*, W. N. 1887, p. 59.) And it is believed that Mr. Justice Kay requires this course to be adopted.

But where the executors, administrators, or trustees are plaintiffs it is conceived that the best plan is to make all persons interested defendants in the first instance, unless (*a*) there are numerous persons having the same interest; or (*b*) there is an heir-at-law, next of kin, or class, unknown or difficult to ascertain, in either of which cases application should be made for a representation order as aforesaid.

Service of an Originating Summons out of the jurisdiction cannot be allowed: (*Re Busfield*; *Whaley v. Busfield*, 54 L. T. Rep. N. S. 220; 32 Ch. Div. 123; 55 L. J. 467, Ch.; 34 W. R. 372, C. A.; and *Re Bullen Smith*; *Berners v. Bullen Smith*, 57 L. T. Rep. N. S. 924.)

Out of jurisdiction.

Consequently in applications for payment out of court, even where the fund is under 1000*l.*, if any of the respondents are out of the jurisdiction it may be necessary to proceed by petition, as apparently that can be served out of the jurisdiction: (see *Colls v. Robins*, 55 L. T. Rep. N. S. 479; W. N. 1886, p. 111); *Re Gordon's Settlement Trusts* (84 L. T. 45; W. N., Nov. 12, 1887, p. 192), but those cases were not followed by North, J., in *Re Jellard* (60 L. T. Rep. N. S. 83; 39 Ch. Div. 424). On appeal, it appearing that the order sought by the petition was only for carrying into full effect an order which had been obtained by the respondents, the Court of Appeal, without deciding that leave was necessary, gave leave to serve the petition on the solicitors who had presented the former petition. There is no objection to a person out of the jurisdiction being plaintiff in an Originating Summons.

As to service on persons of unsound mind, see *Re Pepper*; *Pepper v. Pepper* (50 L. Rep. N. S. 580; 32 W. R. 765).

5*a*. Any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclose or redeem any mortgage, whether legal or equitable, may take out as of course an Originating Summons, returnable in the chambers of a judge of the Chancery Division, for such relief of the nature or kind following as may by the summons be specified, and as the circumstances of the case may require; that is to say,—

Foreclosure,
redemption,
&c.

Sale, foreclosure, delivery of possession by the mortgagor, redemption, reconveyance, delivery of possession by the mortgagee.

Note.—Add to the heading of Order LV., part 2, the words “Foreclosure and Redemption.”

This rule and 5*b* were added by the rules of December, 1885.

For forms of Originating Summons, &c., under this rule, see Appendix III., *post*.

With reference to this rule it should be borne in mind that by 51 & 52 Vict. c. 43, s. 67 (which is now substituted for 28 & 29 Vict. c. 99, s. 1) the County Courts have jurisdiction in all actions "for foreclosure or redemption or for enforcing any charge or lien where the mortgage, charge, or lien shall not exceed in amount the sum of 500*l*."

County Court. And if a plaintiff commences proceedings in the High Court where the mortgage does not exceed 500*l*. he incurs the risk of obtaining only such costs as he would have obtained in the County Court. In *Scotto v. Heritage* (15 L. T. Rep. N. S. 349; 3 Eq. 212; 36 L. J. 123, Ch.), which was a suit to foreclose a mortgage for 50*l*. where plaintiff and defendant *lived more than twenty miles apart*, Vice-Chancellor Malins held that the jurisdiction of the High Court was concurrent with that of the County Courts, and that the plaintiff was entitled to the ordinary costs. That case was followed by Sir George Jessel in *Brown v. Rye* (29 L. T. Rep. N. S. 872; 17 Eq. 343; 43 L. J. 228, Ch.) where the mortgage was for 50*l*. and the parties resided more than twenty miles apart. But in *Simon v. McAdam* (6 Eq. 324), where the mortgage was for 40*l*. and the parties lived at the *same place*, Vice-Chancellor Malins held that the plaintiff was entitled only to such costs as he would have obtained in the County Court; and that case was followed by Vice-Chancellor Bacon in *Crozier v. Dowsett* (53 L. T. Rep. N. S. 592; 31 Ch. Div. 67; 55 L. J. 210; 34 W. R. 267) where the mortgage was for 65*l*. 18*s*. 10*d*. and the parties lived at the same place.

As to the new County Courts Act see *post*, Chapter XX.

In an order for foreclosure in the case of an equitable mortgage it is usual and necessary to order the defendant to convey the mortgaged property to the plaintiff. Rule 5a is silent on this point, but, as it expressly mentions equitable mortgages, it is conceived that the judge would order such a conveyance on Originating Summons.

Rule 5a appears to apply, however complicated or difficult the case may be, and *primâ facie*, if a plaintiff proceeds by writ instead of by summons, he will only be allowed summons' costs: (*O'Kelly v. Culverhouse*, 82 L. T. 284; W. N. 1887, p. 36.)

Unless he claims a personal judgment against the mortgagor: (see *Brooking v. Skewis*, 58 L. T. Rep. N. S. 73; W. N. 1887, p. 250.)

In *Johnson v. Evans* (60 L. T. Rep. N. S. 29; Sol. J., Dec. 1, 1888, p. 75) a question arose as to what costs should be allowed successful plaintiffs in a redemption suit, where the relief might have been obtained by summons. The plaintiffs who were execu-

tors of a mortgagor had tendered to the defendants, the mortgagees, previous to the action being commenced, the amount due on the mortgage. The defendants did not dispute the amount, but one of them declined to reconvey, alleging that the plaintiffs had not proved their title to redeem. This action for redemption was then brought, and at the trial the plaintiffs proved their tender and their title by oral evidence, and recovered judgment. Kekewich, J. held, that the plaintiffs were entitled to such costs only as would have been incurred on an Originating Summons under Order LV., r. 5 (a), contested by the defendants and attended by counsel in chambers, including the costs of witnesses examined in court.

The fact that a receiver is asked for is not sufficient ground for Receiver. proceeding by writ instead of by Originating Summons: (*Gee v. Bell*, 56 L. T. Rep. N. S. 305; 35 Ch. Div. 160; 56 L. J. 718, Ch.; 35 W. R. 805; *Barr v. Harding*, 58 L. T. Rep. N. S. 74; W. N. 1887, p. 251.)

When the plaintiff mortgagee took out Originating Summons against the defendants, the mortgagor and second mortgagee, for redemption or foreclosure, and in chambers the usual order was made, the Court on motion appointed a receiver: (*Weston v. Levy*, W. N., April 2, 1887, p. 76.)

A receiver can be appointed in chambers at any time after the Originating Summons has been served: (see *Re Francke*; *Drake v. Francke*, W. N. 1888, p. 69, *ante*, p. 86, which was an administration action.)

A mortgagee who has obtained a foreclosure judgment *nisi* by Originating Summons under this rule, may, on default of payment by the mortgagee, obtain a judgment for foreclosure absolute and for delivery of possession of the mortgaged property, even though the summons does not expressly ask for the delivery of possession: (*Best v. Applegate*, 57 L. T. Rep. N. S. 599; 37 Ch. Div. 42, following *Lacon v. Tyrell*, W. N. 1887, p. 71), and see *Manchester and Liverpool Bank v. Parkinson* (60 L. T. Rep. N. S. 258; W. N., Feb. 9, 1889, p. 27.)

In *Keith v. Day* (60 L. T. Rep. N. S. 126; 39 Ch. Div. 452; 58 L. J. 126, Ch.; 37 W. R. 242, C. A.) where a summons for foreclosure asked for delivery of possession, and the usual foreclosure order was made without any direction as to possession, after order for foreclosure absolute, plaintiff moved for an order on defendant to deliver up possession: Held, that such order ought to be made without putting plaintiff to a new action for the purpose.

In an action, commenced by Originating Summons by mortgagees, to enforce their security, an order was made directing the usual account and sale of a part of the property, and afterwards an order for sale of

another part was made. The sales were effected, and proceeds paid into court. It became necessary to sell a further part on which persons not before the court had a prior charge. It was held that the first order was a final judgment, and that new parties could not be brought in by amendment: (*Gwatkin v. Dowling*, 84 L. T. 81; W. N. 1887, p. 208.)

Whom to
serve.

5*b*. The persons to be served with the summons under the last preceding rule shall be such persons as under the existing practice of the Chancery Division would be the proper defendants to an action for the like relief as that specified by the summons.

For parties to actions concerning securities, see Fisher on Mortgages, vol. 2, 3rd edit. p. 883 *et seq.*, and 4th edit. p. 811; and Coote on Mortgages, vol. 2, p. 1086 *et seq.*, 5th edit.; and Seton, vol. 2, part 1, p. 1050.

6. The court or a judge may direct such other persons to be served with the summons as they or he may think fit.

As to parties, see *ante*, p. 13.

Evidence.

7. The application shall be supported by such evidence as the court or a judge may require, and directions may be given as they or he may think just for the trial of any questions arising thereout.

There is no hard-and-fast rule as to evidence in these cases. Where there is no dispute about the facts the court accepts something short of strict evidence.

Certificate evidence of births, marriages, and deaths would not usually be required unless the question was who were the next of kin, or the like.

Whenever it is intended to deal with a fund in court strict evidence must be adduced. And when the property is large it may be allowable to prove the facts strictly, but in other cases something short of strict evidence may be filed in the first instance, leaving the court or judge to call for further evidence if requisite. See further, chapter on Evidence, *ante*, p. 27, and forms of affidavits, Appendix III., *post*.

Judgment.

8. It shall be lawful for the court or a judge upon

such summons to pronounce such judgment as the nature of the case may require.

After final judgment new parties cannot be brought in by amendment: (*Gwatkin v. Dowling*, W. N. 1887, p. 208.)

9. The court or a judge may give any special directions touching the carriage or execution of the judgment, or the service thereof upon persons not parties, as they or he may think just.

10. It shall not be obligatory on the court or a judge to pronounce or make a judgment or order, whether on summons or otherwise, for the administration of any trust or of the estate of any deceased person, if the questions between the parties can be properly determined without such judgment or order.

This rule applies to actions commenced before the rules came into operation: (*Re Llewellyn*; *Lane v. Lane*, 25 Ch. Div. 66; 49 L. T. Rep. N. S. 399.)

This rule applies even when infants are interested, and it does not follow, because an infant is interested, that administration proceedings should be allowed at the expense of the estate: (*Re Blake*; *Pughe Jones v. Blake*, 53 L. T. Rep. N. S. 302; 29 Ch. Div. 913; 33 W. R. 886, Ct. of App.) In this case *Re Wilson*; *Alexander v. Calder* (28 Ch. Div. 457; 54 L. J. 487, Ch.; 33 W. R. 579) was "explained."

Under this rule, "where there are questions which cannot properly be determined without some accounts and inquiries or directions, which would form part of an ordinary administration decree, then the right of the party to have the decree or order is not taken away; but the court may restrict the order simply to those points which will enable the question which requires to be adjudicated upon to be settled:" (per Cotton, L.J. in *Re Blake*; *Pughe Jones v. Blake*, *supra*.) As to the costs of proceedings for administration, see the same case.

Where an action was brought against trustees for administration of a trust in which they were charged with breaches of trust, an application by the plaintiff under Order XV., r. 1, for accounts and inquiries, some of which were directed to the alleged breaches of trust, was refused, the court exercising its discretion under Order LV., r. 10: (*Re Gyhon*; *Allen v. Taylor*, 29 Ch. Div. 834; 53 L. T. Rep. N. S. 539; 54 L. J. 945, Ch.; 33 W. R. 620.)

The court will not make an order under this rule on a summons taken out in an action where the point raised on the summons is one which should properly be determined at the trial of the action: (*Borthwick v. Ransford*, 28 Ch. Div. 79; 54 L. J. 569, Ch.; 33 W. R. 161.)

The court will avoid making a general administration decree where practicable, but a doubt has been suggested whether any decree short of one for general administration would bind creditors: (*Re Mills*; *Mills v. Mills*, W. N. 1884, p. 21.) This difficulty however, is in a great measure met by Order LV., r. 10a, below.

Where a testator directed his trustees to commence an administration action, they took out an Originating Summons under Order LV., r. 3, for directions, and it was held that they were bound to commence proceedings, but that it was unnecessary to have a full administration order: (*Re Stocken*; *Jones v. Hawkins*, 59 L. T. Rep. N. S. 425; 38 Ch. Div. 319, C. A.; 57 L. J. 746, Ch.)

General administration was considered necessary for the protection of executors where there were questions involving considerable complication, although the debts were small, and the real and personal estate of considerable value, in *Re Dickinson*; *Dickinson v. Walker* (W. N. 1884, p. 199).

10a. Upon an application for administration or execution of trusts by a creditor or beneficiary under a will, intestacy, or deed of trust, where no accounts or insufficient accounts have been rendered, the court or a judge may, in addition to the powers already existing—

- a. Order that the application shall stand over for a certain time, and that the executors, administrators, or trustees in the meantime shall render to the applicant a proper statement of their accounts, with an intimation that if this is not done they may be made to pay the costs of the proceedings:
- b. When necessary, to prevent proceedings by other creditors, make the usual judgment or order for administration, with a proviso that no proceedings are to be taken under such judgment or order without leave of the judge in person.

This rule was added by the Rules of December, 1885.

11. When any summons under Rules 3 or 4 of this Order has been taken out, every subsequent summons relating to the same estate or trust shall be marked with the name of the judge, to whom, for the time being, the matter is assigned, and in case any such subsequent summons shall be marked with the name of another judge it shall be the duty of the executors, administrators, or trustees, to apply for the transfer to such first-mentioned judge of such subsequent summons. Marking
name of judge.

12. The issue of a summons under Rule 3 of this Order shall not interfere with or control any power or discretion vested in any executor, administrator, or trustee, except so far as such interference or control may necessarily be involved in the particular relief sought. Powers of
trustees.

In *Re Hall: Hall v. Hall* (51 L. T. Rep. N. S. 901; 54 L. J. 527, Ch.; 33 W. R. 508; W. N. 1885, p. 17), on the 20th May, 1883, judgment was given in the action under Order LV., r. 3, R. S. C., not directing a general execution of the trusts of the will, but directing certain inquiries, among which was an inquiry whether any and what persons had been appointed new trustees, and whether any and what proceedings should be taken for the appointment of new trustees of the said will. By deed dated the 21st Dec. 1884, the defendant, in exercise of the power given him by the Conveyancing Act, 1881, appointed A. B. a trustee of the said will jointly with himself. It was held that the proper course would have been for the defendant not to have filled up the vacancies in the trusteeship without an application to the court in chambers stating that he intended to appoint A. B., and if it was found that there was no objection to his appointment it would have been approved.

After a decree for administration a trustee cannot exercise his powers without the sanction of the court: (see Lewin on Trusts, 617, 8th edit.) As to how far the court will interfere with a discretion given to trustees, see *Gisborne v. Gisborne* (2 App. Cas. 300; 36 L. T. Rep. N. S. 564; 46 L. J. 556, Ch.; 25 W. R. 516); and *Re Lofthouse* (29 Ch. Div. 921; 53 L. T. Rep. N. S. 174; 54 L. J. 1087, Ch.; 33 W. R. 668.)

13. Any application to a judge in chambers under Charitable
trusts.

the Charitable Trusts Act, 1853, section 28, shall be made by summons.

These applications are by Originating Summons. For forms, see Dan. F. 2041 *et seq.*

New trustees.

[13a. In all cases in which the court has jurisdiction to appoint new trustees upon petition, an application may be made to a judge in chambers by summons, and new trustees thereupon appointed. The summons shall be intituled in the same manner as the petition ought to have been, and shall be served upon the same persons upon whom the petition ought to have been served.]

This rule was added by the Rules of December, 1888.

See this rule fully treated of, *post*, Chapter X.

Charitable trusts.

14. No order made under the Act in the last preceding rule (a) mentioned by the judge in chambers shall be subject to appeal where the gross annual income of the charity has not been declared by the Charity Commissioners for England and Wales to exceed 100*l.*, unless the judge by whom such order may have been made shall certify that such appeal ought to be permitted either absolutely or on such terms as the judge may think fit to impose.

Order LV., Rules 13 and 14.

Section 28 of the Charitable Trusts Act 1853 (16 & 17 Vict. c. 137) declares that "where the appointment or removal of any trustee, or any other relief, order, or direction relating to any charity of which the gross annual income for the time being exceeds thirty pounds, shall be considered desirable, and such appointment, removal, or other relief, order, or direction might now (*i.e.*, on the 20th Aug. 1853) be made or given by the Court of Chancery, in respect either of its ordinary, or its special, or statutory jurisdiction, or by the Lord Chancellor intrusted with the care and commitment of the custody of lunatics," any person authorised in that behalf by a certificate of the Charity Commissioners (or the Attorney-General) may apply in chambers to the Master of the Rolls, or a Vice-Chancellor (now a judge of the Chancery Division), who may make

(a) *i.e.* rule 13, above.

the necessary orders, or direct an action to be commenced: (see Mitcheson on the Charity Commission Acts, 131; Dan. 2047.)

On a summons under this section the court has jurisdiction to decide the question whether the property which is the subject of the summons is held upon a charitable trust or not: (*Re Norwich Town-Close Estate Charity*, 60 L. T. Rep. N. S. 202; 40 Ch. Div. 298; 37 W. R. 362, C. A.)

The Palatine Chancery Court of Lancaster has concurrent jurisdiction as to charities within its jurisdiction whose gross income exceeds 30*l.*: (16 & 17 Vict. c. 137, s. 29.)

The Act extends to City of London Charities under (as well as over) 30*l.* (sect. 30); but see restrictions contained in sect. 40 of the City of London Parochial Charities Act 1883 (46 & 47 Vict. c. 36); Mitcheson, 351.

The County Court has jurisdiction where the gross annual income does not exceed 50*l.*: (16 & 17 Vict. c. 137, s. 32, amended by 23 & 24 Vict. c. 136, s. 11.)

No judge under this Act has jurisdiction to try the title to any property as between the charity and any person claiming adversely to the charity, or to try or determine any question as to the existence or extent of any charge or trust: (16 & 17 Vict. c. 137, s. 41.)

Applications under these Acts may be made by the Attorney-General, a trustee or trustees of the charity, or two or more inhabitants of any parish or place within which the charity is administered or applicable: (16 & 17 Vict. c. 137, s. 43.)

The Charity Commissioners have power to certify cases to the Attorney-General, who may then institute proceedings in chambers or otherwise: (16 & 17 Vict. c. 137, s. 20.)

It will be seen that, except in proceedings by the Attorney-General, the certificate of the Charity Commissioners is essential in proceedings under 16 & 17 Vict. c. 137, s. 28.

As to when such certificate is necessary in proceedings relating to charities taken otherwise than under this statute, see 16 & 17 Vict. c. 137, ss. 17, 18; Dan. 2039-2041; Mitcheson, 100-107. For form of application to the Charity Commissioners, for such certificate, see Mitcheson, 107.

It may be mentioned that an application for payment out of court of money belonging to a charity, paid in under the L. C. C. Acts, or the Trustee Relief Acts, does not require the previous certificate of the Charity Commissioners. See Tyssen on "Charitable Bequests," 539-541.

As to procedure, see Dan. 2049, 2050.

For forms, see Dan. F. 2041-3.

Applications to the court under the Charitable Trusts Act, 1853.

are often rendered needless by the Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), sect. 2, under which the Charity Commissioners may (subject to appeal), on the application of persons who are authorised to make applications to the court under the former Act, make effectual orders, such as the judge in chambers could have made, "for the appointment or removal of trustees of any charity, or for the removal of any schoolmaster or mistress or other officer thereof, or for or relating to the assurance, transfer, payment, or vesting of any real or personal estate belonging thereto, or entitling the official trustees of charitable funds or any other trustees, to call for a transfer of, and to transfer any stock belonging to such estate, or for the establishment of any scheme for the administration of any charity." This power is subject to limitations where the gross annual income of the charity is over 50*l.*, exclusive of land or buildings used exclusively for the charity (23 & 24 Vict. c. 136, s. 4; 32 & 33 Vict. c. 110, s. 5), and in contentious cases (23 & 24 Vict. c. 136, s. 5); but see *Re Burnham* (L. Rep. 17 Eq. 241; 29 L. T. Rep. N. S. 495; 43 L. J. 340, Ch.; 22 W. R. 198.) And as to the powers of the Charity Commissioners generally, see *Re Campden Charities* (18 Ch. Div. 310; 45 L. T. Rep. N. S. 152; 50 L. J. 646, Ch.; 30 W. R. 496, C. A.)

3. Powers and Duties of Chief Clerks.

Duties of
chief clerks.

15. The judges of the Chancery Division to whom chambers are attached, shall have power, subject to these rules, to order what matters shall be heard and investigated by their chief clerks, either with or without their direction, during their progress; and what matters shall be heard and investigated by themselves, and particularly if the judge shall so direct, his chief clerks shall take such accounts and make such inquiries as have usually been taken and made by the chief clerks, and the judge shall give such aid and directions in every such account or inquiry as he may think fit, but subject to the right hereinafter provided for the parties to bring any particular point before the judge; [*provided that no judgment or order for general administration shall be made under rule 4 of this Order or otherwise by a chief clerk.*]

The proviso printed in italics is repealed by R. S. C., 1885, being 15A below.

As to adjournments from the chief clerk to the judge, see *ante*, p. 9.

15*a*. The proviso at the end of Order LV., r. 15, is hereby annulled and the following proviso is substituted therefor :

Provided, that no order for general administration or for the execution of a trust, or for accounts or inquiries concerning the property of a deceased person, or other property held upon any trust, or the parties entitled thereto, shall be made except by the judge in person : Provided also that summonses under rule 3 of this Order, the object of which is to obtain the opinion of the court or a judge upon the construction of a document or any question of law, and any application for the appointment of a provisional liquidator, and applications for substituted service and for service out of the jurisdiction shall be brought before the judge in person.

This rule was added by the Rules of December, 1885.

16. Each chief clerk shall, for the purpose of any proceedings directed to be taken before him, have full power to issue advertisements, to summon parties and witnesses, to administer oaths, to require the production of documents, to take affidavits and acknowledgments, other than acknowledgments by married women, and when so directed by the judge to examine parties and witnesses, either upon interrogatories or *vivâ voce*, as the judge shall direct.

17. Parties and witnesses summoned to attend before a chief clerk shall be bound to attend in pursuance of the summons, and shall be liable to process of contempt in like manner as parties or witnesses are liable thereto in case of disobedience to any order of the court, or in case of default in attendance, in pursuance of any order of the court or of any writ of *subpœna ad testificandum*, and all persons swearing or affirming before any chief clerk

shall be liable to all such penalties, punishments, and consequences for any wilful and corrupt false swearing or affirming contained therein, as if the matters sworn or affirmed had been sworn and affirmed before any other person by law authorised to administer oaths, to take affidavits, and to receive affirmations.

“A chief clerk’s summons for a person to attend for examination does not come within the words ‘any order of the court or writ of *subpœna ad testificandum*’ in rule 17 of Order LV. . . . It is quite immaterial that the defendant is a party to the action, inasmuch as he is summoned to be examined only as a witness, and consequently must be dealt with as a witness, and not otherwise. The words of the rule have to be read distributively. The defendant’s disobedience is not disobedience to an order of the court. It seems to me, therefore, that the proper course will be for an order to be made, under rule 13 of Order XXXVII., for the defendant to attend, at his own expense, before the chief clerk to be examined on a day to be fixed by the registrar. If he does not attend there will then be no difficulty in obtaining a writ of attachment against him. The defendant must pay the costs of this motion:” (*Powell v. Nevitt*, 55 L. T. Rep. N. S. 729.)

As to evidence generally, see p. 27 *et seq.*

Transfer.

17a. Any chief clerk shall have power, without any transfer of the cause or matter, to take any business of any other chief clerk, unless the judge to whose chambers any such chief clerk may be for the time being attached shall otherwise direct.

This rule was added by R. S. C., December, 1885.

Computation.

18. The court or judge may direct any computation of interest or the apportionment of any fund, to be certified by the chief clerk, and to be acted upon by the Paymaster-General or other person without further order.

4. Assistance of Experts.

Accountants.
&c.

19. The judge in chambers may, in such way as he thinks fit, obtain the assistance of accountants, mer-

chants, engineers, actuaries, and other scientific persons the better to enable any matter at once to be determined, and he may act upon the certificate of any such person.

The fact that an accountant is employed does not lessen the court fees: (see *Re Hutchinson*; *Hutchinson v. Norwood*, 50 L. T. Rep. N. S. 486; W. N. 1884, p. 35; 32 W. R. 392.)

CHAPTER IX.

ORDER LV., R. S. C. 1883, RULES 20 TO END.

5. *Summonses in Chambers.*

Form of
Originating
Summonses.

20. An Originating Summons shall be in the Form No. 25 in Appendix L, with such variations as circumstances may require. It shall be prepared by the applicant or his solicitor, and shall be sealed in the central office, and when so sealed shall be deemed to be issued. The person obtaining the summons shall leave at the central office a copy thereof, which shall be filed and stamped in the manner required by law.

For form see *post*, Appendix II., and for the authors' forms of Originating Summonses, see Appendix III., *post*.

And for official notice as to the titles to Originating Summonses see *post*, Appendix II.

By direction of the judges of the Chancery Division issued the 19th Nov., 1885, before an Originating Summons is sealed under the next rule, the plaintiff's or applicant's solicitor is required to certify that no proceedings have been taken and no previous application made to effect a similar object and (unless marked for a particular judge under Order V., r. 9, sub-sect. e.) that the summons does not relate to any other matter assigned to any judge of the said court so as to be conveniently dealt with by the same judge. For form of such certificate see *post*, Appendix II.

By additional office rules settled by the Practice Masters, March, 1884 :—

“Originating Summonses in the Chancery Division are to be issued in the same manner as writs of summons. The stamp denoting the fee is to be put on the copy filed and the original sealed and delivered to the party issuing, but no other duplicates or copies for service are to be sealed.

“All other Originating Summonses are to be issued in the summons and order department in the same manner as ordinary summonses for chambers.”

For "Parties" see *ante*, p. 13, "Evidence," *ante*, p. 27, and "Service," *ante*, p. 49.

By R. S. C. May, 1887 :—

"Originating Summonses may be sealed and issued in the district registries of Liverpool and Manchester respectively, and appearances thereon shall be entered in the same respective registries; and the provisions of the Rules of the Supreme Court and in particular of Order LV., rr. 20 and 23, shall be applied accordingly."

21. The day and hour for attendance under an Originating Summons shall be left to be added, after the sealing thereof, in the margin or at the foot of the same, and shall be there inserted when such day and hour shall have been fixed at the chambers of the judge to whom the matter is assigned by the chief clerk, who shall mark the summons with the seal used in such chambers. Time for hearing.

22. Where from any cause an Originating Summons may not have been served upon any party seven clear days before the return thereof, an indorsement may be made upon the summons, and upon a copy thereof stamped for service appointing a new time for the parties not before served to attend at the chambers of the judge, and such indorsements shall be sealed at the judge's chambers, and the service of the copy so indorsed and sealed shall have the same force and effect as the service of an Originating Summons, and where any party has been served before such indorsement, the hearing thereof may, upon the return of the summons, be adjourned to the new time so appointed. Short notice

23. The parties served with an Originating Summons shall, before they are heard in chambers, enter appearances in the central office and give notice thereof. Appearance.

24. The summons by the chief clerk requiring the attendance of parties, witnesses, or others shall be in the Form No. 1* in Appendix L., with such variations as the circumstances of the case may require. Witnesses, &c.

6. *Proceedings relating to Infants.*

Evidence.

25. Upon applications for the appointment of guardians of infants and allowance for maintenance the evidence shall show—

- (a.) The ages of the infants ;
- (b.) The nature and amount of the infants' fortunes and incomes ;
- (c.) What relations the infants have.

See the subject of guardians and maintenance fully discussed *ante*, pp. 71-74.

Settlements.

26. Upon applications to obtain the sanction of the court to infants making settlements on marriage under 18 & 19 Vict. c. 43, evidence shall be produced to show—

- (a.) The age of the infant ;
- (b.) Whether the infant has any parents or guardians ;
- (c.) With whom or under whose care the infant is living, and if the infant has no parents or guardians, what near relations the infant has ;
- (d.) The rank and position in life of the infant and parents ;
- (e.) What the infant's property and fortune consist of ;
- (f.) The age, rank, and position in life, of the person to whom the infant is about to be married ;
- (g.) What property, fortune, and income, such person has ;
- (h.) The fitness of the proposed trustees, and their consent to act ;

The proposals for the settlement of the property of the infant, and of the person to whom such infant is proposed to be married, shall be submitted to the judge.

See the subject of infants' settlements discussed *ante*, p. 70.

Guardian
ad litem.

27. At any time during the proceedings at any judge's chambers under any judgment or order, the judge may, if he shall think fit, require a guardian *ad litem* to be

appointed for any infant or person of unsound mind not so found by inquisition, who has been served with notice of such judgment or order.

7. Documents to be left at Chambers.

28. In all cases of proceedings in chambers under any Copy order. judgment or order, the party prosecuting the same shall leave a copy of such judgment or order at the judge's chambers, and shall certify the same to be a true copy of the judgment or order as passed and entered.

29. Whenever any matter is adjourned from the court Adjournment. to chambers, or any directions are given in court to be acted upon at chambers, whether upon a matter adjourned into court from chambers, or upon any other occasion, without an order being drawn up, a note signed by the registrar, stating for what purpose such matter is adjourned to chambers, or the directions given, shall be procured from the registrar and left at chambers.

30. A note stating the names of the solicitors for all Solicitors. the parties, and showing for which of the parties such solicitors are concerned, shall be left at chambers with every judgment or order.

31. A copy of every certificate of the central office of Certificate. entry of a memorandum of service of notice of a judgment or order, and of every appearance entered by a person served with such notice to attend the proceedings, certified by the solicitor, shall be left at chambers.

8. Summonses to proceed.

32. Every judgment or order directing accounts or Accounts and inquiries to be taken or made shall be brought into the judge's chambers by the party entitled to prosecute the same within ten days after the same shall have been passed and entered, and in default thereof any other party to the cause or matter shall be at liberty to bring in the same, and such party shall have the prosecution

of such judgment or order unless the judge shall otherwise direct.

Summons to proceed.

33. Upon a copy of the judgment or order being left, a summons shall be issued to proceed with the accounts or inquiries directed, and upon the return of such summons the judge, if satisfied by proper evidence that all necessary parties have been served with notice of the judgment or order, shall thereupon give directions as to the manner in which each of the accounts and inquiries is to be prosecuted, the evidence to be adduced in support thereof, the parties who are to attend on the several accounts and inquiries, and the time within which each proceeding is to be taken, and a day or days may be appointed for the further attendance of the parties, and all such directions may afterwards be varied, by addition thereto or otherwise, as may be found necessary.

Persons interested in an estate the subject of an administration action to which they have not been made parties, and whose rights or interest may be affected by an order directing accounts and inquiries, are not bound by the proceedings under that order—at any rate where they ought to be served—unless they are served with notice of the order, or an order has been made appointing a member of their class to represent them in the action: (*May v. Newton*, 34 Ch. Div. 347; 56 L. T. Rep. N. S. 140); and see *ante*, p. 17.

Deed settled by judge.

34. Where by a judgment or order a deed is directed to be settled by the judge in chambers in case the parties differ, a summons to proceed shall be issued, and upon the return of the summons the party entitled to prepare the draft deed shall be directed to deliver a copy thereof, within such time as the judge shall think fit, to the party entitled to object thereto, and the party so entitled to object shall be directed to deliver to the other party a statement in writing of his objections (if any) within eight days after the delivery of such copy, and the proceeding shall be adjourned until after the expiration of the said period of eight days.

By the Judicature Act, 1884 (47 & 48 Vict. c. 61), s. 14, if a person refuses to comply with an order to execute a document, the Court has power to nominate a person to execute the same. In *re Edwards; Owen v. Edwards* (W. N. 1885, p. 74; 33 W. R. 578), the chief clerk was appointed to execute a mortgage under this enactment.

35. Where, upon the hearing of the summons to proceed, it appears to the judge that by reason of absence, or for any other sufficient cause, the service of notice of the judgment or order upon any party cannot be made or ought to be dispensed with, the judge may, if he shall think fit, wholly dispense with such service, or may at his discretion order any substituted service or notice by advertisement or otherwise in lieu of such service.

Dispensing
with service
of notice.

Having regard to sub-sect. 3 of sect. 4 of the Partition Act, 1876, the court has no jurisdiction under this rule to dispense with service of notice of the judgment in a partition action except on the imperative terms of publishing advertisements: (*Phillips v. Andrews*, 56 L. T. Rep. N. S. 108; W. N. 1887, p. 15.)

And see *May v. Newton*, 34 Ch. Div. 347; 56 L. T. Rep. N. S. 140, *supra*.

36. If on the hearing of the summons to proceed it shall appear that all necessary parties are not parties to the action or have not been served with notice of the judgment or order, directions may be given for advertisement for creditors, and for leaving the accounts in chambers, but the adjudication on creditors' claims and the accounts are not to be proceeded with, and no other proceeding is to be taken, except for the purpose of ascertaining the parties to be served, until all necessary parties shall have been served, and are bound, or service shall have been dispensed with, and until directions shall have been given as to the parties who are to attend on the proceedings.

Absence of
parties.

37. The course of proceeding in chambers shall ordinarily be the same as the course of proceeding in court upon motions. Copies, abstracts, or extracts of or

Procedure in
chambers.

from accounts, deeds, or other documents and pedigrees and concise statements shall, if directed, be supplied for the use of the judge and his chief clerks, and where so directed, copies shall be handed over to the other parties. But no copies shall be made of deeds or documents where the originals can be brought in unless the judge shall otherwise direct.

9. *Summons Book.*

38. At the time any summons is obtained, an entry thereof shall be made in "the Summons Book," stating the date on which the summons is issued, the name of the cause or matter, and by what party, and shortly for what purpose such summons is obtained, and at what time such summons is returnable.

Lists. 39. Lists of matters appointed for each day shall be made out and affixed outside the doors of the chambers of the respective judges; and, subject to any special direction, such matters shall be heard in the order in which they appear in such lists.

39a. Matters coming before the chief clerks shall, unless the judge otherwise directs when ready for hearing, be entered in daily lists, and taken in their order on such lists; and every matter commenced shall be continued until completion, subject to such adjournments as the chief clerk shall for good cause and upon such terms as to costs or otherwise, as he shall think fit, consider necessary.

This rule was added by Rules of December, 1885.

10. *Attendances.*

**Representa-
tive solicitor.**

40. Where, upon the hearing of the summons to proceed, or at any time during the prosecution of the judgment or order, it appears to the judge, with respect to the whole or any portion of the proceedings, that the interests of the parties can be classified, he may require

the parties constituting each or any class to be represented by the same solicitor, and may direct what parties may attend all or any part of the proceedings, and where the parties constituting any class cannot agree upon the solicitor to represent them, the judge may nominate such solicitor for the purpose of the proceedings before him, and where any one of the parties constituting such class declines to authorise the solicitor so nominated to act for him, and insists upon being represented by a different solicitor, such party shall personally pay the costs of his own solicitor of and relating to the proceedings before the judge, with respect to which such nomination shall have been made, and all such further costs as shall be occasioned to any of the parties by his being represented by a different solicitor from the solicitor so to be nominated.

For form of summons for a classification order, see Dan. F. 1163.

It will be observed that this rule only applies to proceedings after judgment.

Where, in an administration action, the parties beneficially interested in the estate appeared by several solicitors, but were unable to agree as to which solicitor should represent the whole class in the proceedings under the judgment, the court under this rule appointed the official solicitor to the suitor's fund to represent the class: (*Re Docwra*; *Docwra v. Faith*, W. N. 1884, p. 174; affirmed Ct. of App., *ib.*, p. 232. See comment in 79 L. T. 277.)

To entitle a person interested in an administration action to the costs of attending proceedings in chambers under the decree, he must attend by special leave of the judge; and, if he attends under the common order of course and without special leave he may be ordered to pay in addition to his own costs the extra costs occasioned by his attendance: (*Sharp v. Lush*, 10 Ch. Div. 468; 48 L. J. 231, Ch.; 27 W. R. 528.) But he *may* be allowed the costs of attending the hearing on further consideration, if there is a question to be argued: (*Ib.*)

As to "Parties" generally, see *ante*, p. 13.

41. Whenever in any proceeding before a judge in chambers the same solicitor is employed for two or more parties, such judge may at his discretion require that Distinct solicitors.

any of the said parties shall be represented before him by a distinct solicitor, and adjourn such proceedings until such party is so represented.

Attendance at party's own expense.

42. Any of the parties other than those who shall have been directed to attend may attend at their own expense, and upon paying the costs, if any, occasioned by such attendance, or, if they think fit, they may apply by summons for liberty to attend at the expense of the estate, or to have the conduct of the action either in addition to or in substitution for any of the parties who shall have been directed to attend.

Drawing up of order.

43. An order is to be drawn up on a summons to be taken out by the plaintiff or the party having the conduct of the action, stating the parties who shall have been directed to attend and such of them (if any) as shall have elected to attend at their own expense, and such order is to be recited in the chief clerk's certificate.

11. *Advertisements for Creditors and Claimants.*

Advertisement.

44. Where a judgment or order is given or made, whether in court or in chambers, directing an account of debts, claims, or liabilities, or an inquiry for heirs, next of kin, or other unascertained persons, unless otherwise ordered, all persons who do not come in and prove their claims within the time, which may be fixed for that purpose by advertisement, shall be excluded from the benefit of the judgment or order.

See rule 57, *post*.

A creditor may come in at any time as long as there are assets undistributed: (see *Re Metcalfe*; *Hicks v. May*, 41 L. T. Rep. N. S. 572; 13 Ch. Div. 236, C. A.)

See further Morgan, 499.

45. Where an advertisement is required for the purpose of any proceeding in chambers, a peremptory advertisement, and only one, shall be issued, unless for any special reason it may be thought necessary to issue

a second advertisement or further advertisements, and any advertisement may be repeated as many times and in such papers as may be directed.

46. The advertisement for claimants shall be prepared by the party prosecuting the judgment or order, and submitted to the chief clerk for approval, and when approved shall be signed by him, and such signature shall be sufficient authority to the printer of the *Gazette* to insert the name. Preparation of advertisement.

The words "for claimants" were supplied by R. S. C., December, 1885.

46a. The advertisement for creditors shall be prepared and signed by the solicitor of the party prosecuting the judgment or order; and such signature shall be sufficient authority to the printer of the *Gazette* to insert the same.

This rule was added by R. S. C., December, 1885.

In *Wood v. Weightman* (26 L. T. Rep. N.S. 385; 13 Eq. 436) it was stated by Lord Romilly, M.R., that the court never allowed an estate to be distributed without notice being inserted in the *London Gazette*, and that they generally required an advertisement to be inserted in the *Times*. And that when an estate was administered of a testator in the country the notice was also inserted in some newspaper having a local circulation in the neighbourhood: (see also Dan. 995.)

If there is any reasonable ground for supposing that there is a claimant residing in a foreign country, or in one of our colonies, the notice should be advertised there also: (see *Newton v. Sherry*, 45 L. J. 257, C. P.; 24 W. R. 371; 34 L. T. Rep. N. S. 251; 1 C. P. Div. 256.)

47. Advertisements for creditors and other claimants shall fix a time within which each claimant, not being a creditor, is to come in and prove his claim, and within which each creditor is to send to the executor or administrator of the deceased, or to such other party as the judge shall direct, or to his solicitor, to be named and described in the advertisement, the name and address Advertisements.

of such creditor and the full particulars of his claim, and a statement of his account and the nature of the security (if any) held by him. Such advertisements shall be in one of the Forms No. 2* and 3*, in Appendix L., with such variations as the circumstances of the case may require. At the time of directing such advertisement a time shall be fixed for adjudicating on the claims.

Office copies.

48. Claimants filing affidavits shall not be required to take office copies, but the person who examines the claims shall take office copies and produce the same at the hearing, unless the judge shall otherwise direct.

As to cross-examining a claimant upon his affidavit see *Cast v. Poyser* (26 L. J. N. S. 353, Ch. ; 3 Jur. N. S. 38.)

Evidence of claim.

49. No creditor need make any affidavit nor attend in support of his claim (except to produce his security) unless he is served with a notice requiring him to do so as hereinafter provided.

Production of security.

50. Every creditor shall produce the security (if any) held by him before the judge at such time as shall be specified in the advertisement for that purpose, being the time appointed for adjudicating on the claims, and every creditor shall, if required, by notice in writing (Form No. 4*, in Appendix L.) to be given by the executor or administrator of the deceased, or by such other party as the judge shall direct, produce all other deeds and documents necessary to substantiate his claim before the judge at his chambers at such time as shall be specified in such notice.

51. In case any creditor shall direct or refuse to comply with the last preceding rule, he shall not be allowed any costs of proving his claim unless the judge shall otherwise direct.

Examination of claims.

52. The executor or administrator of the deceased, or such other party as the judge shall direct, shall examine the claims of creditors sent in pursuant to the

advertisement, and shall ascertain, so far as he is able, to which of such claims the estate of the deceased is justly liable, and he shall, at least seven clear days prior to the time appointed for adjudication, file an affidavit (Form No. 5*, in Appendix L.), to be made by such executor or administrator, or one of the executors or administrators, or such other party, either alone or jointly with his solicitor or other competent person, or otherwise, as the judge shall direct, verifying a list of the claims (Form No. 6*, in Appendix L.), the particulars of which have been sent in pursuant to the advertisement, and stating to which of such claims, or parts thereof respectively, the estate of the deceased is in the opinion of the deponent justly liable, and his belief that such claims, or parts thereof respectively, are justly due and proper to be allowed, and the reasons for such belief.

53. In case the judge shall think fit so to direct, the making of the affidavit referred to in the last preceding rule shall be postponed till after the day appointed for adjudication, and shall then be subject to such directions as the judge may give.

54. Where on the day appointed for hearing the Adjournment. claims any of them remain undisposed of, an adjournment day for hearing such claims shall be fixed, and where further evidence is to be adduced, a time may be named within which the evidence on both sides is to be closed, and directions may be given as to the mode in which such evidence is to be adduced.

55. At the time appointed for adjudicating upon the Allowing claims of creditors, or at any adjournment thereof, the claims. judge may, in his discretion, allow any of the claims, or any part thereof respectively, without proof by the creditors, and direct such investigation of all or any of the claims not allowed, and require such further particulars, information, or evidence relating thereto as

he may think fit, and may, if he so think fit, require any creditor to attend and prove his claim, or any part thereof, and the adjudication on such claims as are not then allowed shall be adjourned to a time to be then fixed.

Notice to
creditors.

56. Notice (Form No. 7*, in Appendix L.) shall be given by the executor or administrator, or such other party as the judge shall direct, to every creditor whose claim, or any part thereof, has been allowed without proof by the creditor, of such allowance, and to every such creditor as the judge shall direct to attend and prove his claim or such part thereof as is not allowed by a time to be named in such notice (Form No. 8,* in Appendix L), not being less than seven days after such notice, and to attend at a time to be therein named, being the time to which the adjudication thereon shall have been adjourned, and in case any creditor shall not comply with such notice, his claim, or such part thereof as aforesaid, shall be disallowed.

Late claims.

57. After the time fixed by the advertisement no claims shall be received (except as hereinbefore provided in case of an adjournment), unless the judge at chambers shall think fit to give special leave, upon application made by summons, and then upon such terms and conditions as to costs and otherwise as the judge shall think fit.

Costs of
establishing
claims.

58. A creditor who has come in and established his debt in the judge's chambers under any judgment or order shall be entitled to the costs of so establishing his debt, and the sum to be allowed for such costs shall be fixed by the judge, unless he shall think fit to direct the taxation thereof; and the amount of such costs, or the sum allowed in respect thereof, shall be added to the debt so established.

See Morgan, 502-3.

List of claims.

59. A list of all claims allowed shall, when required

by the judge, be made out and left in the judge's chambers by the person who examines the claims.

60. Where any judgment or order is made for payments by the Paymaster-General to creditors, the party whose duty it is to prosecute such judgment or order shall send to each such creditor or his solicitor (if any) a notice (Form No. 9*, in Appendix L.), that the cheques may be received from the Paymaster-General, and such party shall, when required, produce such judgment or order and any other papers necessary to enable such creditors to receive their cheques and get them passed. Notice to creditors.

61. Every notice by this order required to be given to creditors or other claimants shall, unless the judge shall otherwise direct, be deemed sufficiently given and served if transmitted by the post prepaid to the creditor or other claimant to be served according to the address given in the claim sent in by him pursuant to the advertisement, or in case such creditor or other claimant shall have employed a solicitor, to such solicitor according to the address given by him.

12. *Interest.*

62. Where a judgment or order is made directing an account of the debts of a deceased person, unless otherwise ordered, interest shall be computed on such debts as to such of them as carry interest after the rate they respectively carry, and as to all others after the rate of four per cent. per annum from the date of the judgment or order. Interest when allowed.

63. A creditor whose debt does not carry interest, who comes in and establishes the same before the judge in chambers under a judgment or order of the court or of the judge in chambers, shall be entitled to interest upon his debt at the rate of four per cent. per annum from the date of the judgment or order out of any assets which may remain after satisfying the costs of the cause or

matter, the debts established, and the interest of such debts as by law carry interest.

In an action for administration of the estate of a person who has died insolvent since the commencement of the Judicature Act, 1875, a creditor on the estate whose debt carries interest is only entitled to interest up to the date of the judgment for administration which, by virtue of sect. 10 of that Act, is equivalent to an adjudication in bankruptcy for this purpose: (*Re Summers*; *Boswell v. Gurney*, 13 Ch. Div. 136; 27 W. R. 865.)

Interest on
legacies.

64. Where a judgment or order is made directing an account of legacies, interest shall be computed on such legacies after the rate of four per cent. per annum from the end of one year after the testator's death, unless otherwise ordered, or unless any other time of payment or rate of interest is directed by the will, and in that case according to the will.

In *Re Olive*; *Olive v. Westerman* (50 L. T. Rep. N. S. 355; W. N. 1884, p. 81; 53 L. J. 525, Ch.; 32 W. R. 608), where a testator who died in 1876, by will made in 1875, directed certain legacies to be paid within four years after his decease, it was held that the legatees were entitled to be paid interest as from one year after the testator's death.

13. *Certificates of the Chief Clerk.*

Concise certi-
ficate.

65. The directions to be given for or touching any proceedings before the chief clerk shall require no particular form, but the result of such proceedings shall be stated in the shape of a concise certificate to the judge. It shall not be necessary for the judge to sign such certificate, and unless an order to discharge or vary the same is made, the certificate shall be deemed to be approved and adopted by the judge.

66. The certificate of the chief clerk shall not, unless the circumstances of the case render it necessary, set out the judgment or order or any documents or evidence or reasons, but shall refer to the judgment, or order, documents, and evidence or particular paragraphs thereof, so

that it may appear upon what the result stated in the certificate is founded.

66A. The certificate shall, when the judge shall so direct, be prepared by the solicitor of one of the parties, who shall obtain an appointment to settle the certificate, and shall give notice of such appointment to the other parties. No summons to settle the certificate of the chief clerk shall hereafter be issued.

This rule was added by Rules of December, 1885.

67. The certificate of the chief clerk shall be in the **Form.** Form No. 10*, in Appendix L., with such variations as the circumstances may require, and when prepared and settled shall be transcribed in such form, and within such time as the Chief Clerk shall require, and shall be signed by the Chief Clerk either then or (if necessary) at an adjournment to be made for the purpose.

68. Where an account is directed, the certificate shall state the result of such account, and not set the same out by way of schedule, but shall refer to the account verified by the affidavit filed, and shall specify by the numbers attached to the items in the account which, if any, of such items have been disallowed or varied, and shall state what additions, if any, have been made by way of surcharge or otherwise, and where the account verified by the affidavit has been so altered that it is necessary to have a fair transcript of the account as altered, such transcript may be required to be made by the party prosecuting the judgment or order, and shall then be referred to by the certificate. The accounts and the transcripts (if any) referred to by certificates shall be filed therewith, or retained in chambers and subsequently filed, as the judge in chambers may direct. No copy of any such account shall be required to be taken by any party.

Account how
stated.

69. Any party may, before the proceedings before the Chief Clerk are concluded, take the opinion of the **Reference to judge.**

judge upon any matter arising in the course of the proceedings without any fresh summons for the purpose.

This confirms the practice as laid down in *Upton v. Brown*, 47 L. T. Rep. N. S. 289; 20 Ch. Div. 731; 30 W. R. 817, C. A.

Transmission
of certifi-
cates.

70. Every certificate, with the accounts (if any) to be filed therewith, shall be transmitted by the Chief Clerk to the Central Office to be there filed, and shall thenceforth be binding on all the parties to the proceedings unless discharged or varied upon application by summons to be made before the expiration of eight clear days after the filing of the certificate, provided that the time for applying to discharge or vary certificates to be acted upon by the Paymaster-General without further order, or certificates on passing receivers' accounts, shall be two clear days after the filing thereof.

Where the Chief Clerk had made his certificate that the sum mentioned in it should be paid by the defendants for occupation rent of premises held by them, and before the eight days from the date of filing the certificate had elapsed, the defendants took out a summons to vary it. A motion on the part of the plaintiff, asking for leave to be given to the receiver to distrain, or for security from the defendants, was ordered to stand over, to come on with the defendants summons to vary (*Craven v. Ingham*, 58 L. T. Rep. N. S. 486; W. N. 1888, p. 83). Here the decision in *Douthwaite v. Spensley* (18 Beav. 74) was followed. "No step in the cause founded on the certificate can be taken until the expiration of the time for applying to discharge or vary it:" (Dan. 1153 citing *Douthwaite v. Spensley*, *ubi sup.*; and see *Morgau*, 505).

Discharge of
certificate.

71. The judge may, if the special circumstances of the case require it, upon an application by motion or summons for the purpose, direct a certificate to be discharged or varied at any time after the same has become binding on the parties.

In *Re Martin*; *Dier v. Martin*, W. N. 1884, p. 112, it was held that special circumstances were sufficiently shown by affidavit.

On an application upon the further consideration of an action for an extension of the time, under this rule for applying to vary a finding in the chief clerk's certificate after the eight days, it was

held that the applicant should take out a summons for the purpose. The application was granted as there had been a slip and "special circumstances were shown by affidavit": (*Re Dove; Bousfield v. Dove*, 27 Ch. Div. 687; 53 L. J. 1099, Ch.; 33 W. R. 197.)

14. *Further Consideration.*

72. Where any matter originating in chambers shall, Further consideration. at the original or any subsequent hearing, have been adjourned for further consideration in chambers, such matter may, after the expiration of eight days and within fourteen days from the filing of the chief clerk's certificate, be brought on for further consideration by a summons, to be taken out by the party having the conduct of the matter, and after the expiration of such fourteen days by a summons, to be taken out by any other party. Such summons shall be in the form following:—

"That this matter, the further consideration whereof was adjourned by the order of the day of , 18 , may be further considered," and shall be served six clear days before the return. Provided that this rule shall not apply to any matter the further consideration whereof shall, at the original or any subsequent hearing, have been adjourned into Court.

15. *Registering and Drawing up of Orders in Chambers.*

73. Notes shall be kept of all proceedings in the Record in chambers. judge's chambers with proper dates, so that all such proceedings in each cause or matter may appear consecutively, and in chronological order, with a short statement of the questions or points decided or ruled at every hearing.

74. Order LV., r. 74, is hereby annulled, and the Drawing up of orders. following rule shall stand in lieu thereof:—Orders made in chambers to be acted on by the Paymaster-General shall, unless the judge otherwise directs, be drawn up by the registrar, but every other order made in chambers shall, unless the judge otherwise directs, be drawn up by

the chief clerk to whom, according to the distribution of business the cause or matter in which such order is made belongs; and all orders drawn up by the registrars shall be entered in the same manner as orders made in open court.

This rule was added by the Rules of December, 1885.

The annulled rule 74 was as follows:—

74. The judge may direct any order made in chambers to be drawn up by the Registrars, and any such order shall be entered in the same manner as orders made in open court.

Evidence of
order.

74A. In the case of orders to be drawn up by the chief clerks as in the last preceding rule mentioned, an order signed by a Chief Clerk, or a note or memorandum endorsed on the summons upon which any such order is made, and signed or initialed by a chief clerk, shall be sufficient evidence of the order having been made.

This rule was added by the rules of December, 1885.

Forms.

75. The forms Nos. 11* to 24* in Appendix L. shall be used for the respective purposes therein mentioned, with such variations as circumstances may require.

CHAPTER X.

APPOINTMENT OF NEW TRUSTEES.

THE subject of this chapter has been brought within the scope of Originating Summons by the new rules of Dec. 1888, Rule 11 of which is as follows :

ORDER LV., R. 13A.

In all cases in which the court has jurisdiction to New trustees. appoint new trustees upon petition, an application may be made to a judge in chambers by summons, and new trustees thereupon appointed. The summons shall be intituled in the same manner as the petition ought to have been, and shall be served upon the same persons upon whom the petition ought to have been served.

The above rule was made on the 19th Dec. 1888, and came into operation on the 11th Jan. 1889. The rules then made may be cited as the rules of the Supreme Court, December, 1888, or each rule may be cited by the heading thereof with reference to the Rules of the Supreme Court 1883 (rule 15 of Dec. 1888).

It is noticeable that the above rule is silent as to vesting orders. Hitherto the class of such orders obtainable in chambers has been very limited : (see Order LV., r. 2 (8), *ante*, p. 68; and *Re Tweedy*, 52 L. T. Rep. N. S. 65; 28 Ch. Div. 529; 54 L. J. 331, Ch.; 33 W. R. 313).

In *Re Morris's Settlement* (60 L. T. Rep. N. S. 96; 37 W. R. 317; W. N. 1889, p. 31), it was decided by Mr. Justice Chitty that on an application for the appointment of new trustees under the above rule, the court had jurisdiction to make a vesting order, but that in a complicated case a petition for the appointment of new trustees and a vesting order may be presented, and the costs thereof would be allowed.

In *Re Allen; Simes v. Simes* (56 L. T. Rep. N. S. 611; 56 L. J. 779, Ch.), upon an Originating Summons asking for general administration and for the appointment of new trustees all the persons interested being parties to the application, it was held that the court had power in exercise of its general jurisdiction to

order such appointment. But new trustees cannot be appointed upon ordinary summons in an action: (*Re Kay; Littlehales v. Lightfoot*, W. N., April 13, 1889, p. 80.)

Applications to the court for the appointment of new trustees have been much less frequent since the Conveyancing Act, 1881, owing to the power to appoint new trustees conferred by sect. 31 of that Act (for which see *post*, p. 128).

The subject is here dealt with under the following heads :

1. The Trustee Acts, 1850 and 1852.
2. Grounds for application to the court.
3. Who appointed and how many.
4. Practice.
5. Conveyancing Acts, 1881 and 1882.
6. Bankruptcy Act, 1883.

THE TRUSTEE ACTS, 1850 AND 1852 (13 & 14 VICT. c. 60
AND 15 & 16 VICT. c. 55).

Sect. 32 of 13 & 14 Vict. c. 60, is as follows:—

“And be it enacted that whenever it shall be expedient to appoint a new trustee or new trustees, and it shall be found inexpedient, difficult, or impracticable so to do without the assistance of the Court of Chancery, it shall be lawful for the said Court of Chancery to make an order appointing a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees.”

By the Trustee Act, 1852, s. 9, such order may be made “whether there be any existing trustee or not at the time of making such order.”

The trustees will have the same rights and powers as if appointed in a suit (Trustee Act, 1850, s. 33).

The court may make vesting orders as to lands (sect. 34) and stock (sect. 35, amended by Trustee Act 1852, s. 6). For vesting order including property accidentally omitted from former order, see *Re Hopper's Trusts*, 54 L. T. Rep. N. S. 267; 34 W. R. 292; W. N., March 6, 1886, p. 40.

GROUND FOR APPLICATION TO THE COURT.

It is now improper to apply to the court to appoint trustees unless there is some reason beyond the absence of an express power in the instrument creating the trust: (*Re John Gibbon's Trusts*, 45 L. T. Rep. N. S. 756.)

Application to the Chancery Division of the court may still be necessary in the following cases: (1) Where the power to appoint new trustees is vested in a lunatic: (see *Re Sparrow*, L. Rep. 5 Ch. App. 662.) But in *Re Sheppard's Settlement Trusts*, W. N. 1888, p. 234, Stirling, J. held that, where a power of appointing new trustees was vested in a husband and wife, and they were living apart, and were unable to agree in the selection of new trustees, the legal personal representatives of the last surviving trustee were entitled to exercise the power conferred by sect. 31 of the Conveyancing Act, 1881, on the ground that the persons nominated to appoint new trustees were not "able and willing" to act in the exercise of the power. (2) Where the trustee has absconded, and cannot be found. (3) Where a vesting order is required to complete the appointment, as, for instance, where a trustee has been out of the United Kingdom for more than twelve months, and the trust funds consist of Consols.

Where a vesting order is required as to any property vested in a lunatic trustee, application must as a rule be made to the Lord Chancellor or to the Lords Justices of Appeal in Chancery having jurisdiction in lunacy (see sects. 3-6 of the Trustee Act, 1850), but in *Re Gardner's Trusts* (40 L. T. Rep. N. S. 52; 10 Ch. Div. 29) it was decided that when a sole trustee of unsound mind was out of the jurisdiction, the Chancery Division can make a vesting order.

If it should be necessary to apply to the court for the appointment of new trustees merely on the ground that a trustee was of unsound mind, the application should be made in lunacy only: (see *Re John Sharples Ormerod*, 32 L. T. Rep. O. S. 153; 3 De G. & J. 249; *Re Owen*, 4 Ch. App. 282.)

In *Re Lamotte* (4 Ch. Div. 325), and *Re Rolls Hoare* (W. N. 1888, p. 94), where a surviving trustee is lunatic, and it is necessary to apply to the court for the appointment of new trustees and a vesting order, as a rule it is sufficient to apply in lunacy only; but if one of several trustees is lunatic, or if anything in the nature of administration of a trust is necessary the application should be intitled in the Chancery Division as well as in lunacy: (see *Re Pearson*, 37 L. T. Rep. N. S. 299; 5 Ch. Div. 982; and *Re Currie*, 10 Ch. Div. 93.)

It must be taken as settled that where new trustees have been duly appointed under a power the court will not reappoint them with a view to making a vesting order, which will not sever the joint tenancy: see *Re Vicat* (54 L. T. Rep. N. S. 891; 33 Ch. Div. 103, C. A.), and *Re Dewhirst's Trusts* (55 L. T. Rep. N. S. 427; 33 Ch. Div. 416, C. A.), in effect overruling *Re Pearson* (*sup.*) on this point, and *Re Dalgleish* (4 Ch. Div. 143).

Where a person is paralytic and unable to speak, read, or write,

but is not suffering from any mental disease, the petition should not be presented in lunacy but in the Chancery Division: see *Re Barber* (58 L. T. Rep. N. S. 756; 39 Ch. Div. 187); and see *Re Phelp's Settlement Trusts* (54 L. T. Rep. N. S. 480; 31 Ch. Div. 351; 55 L. J. N. S. 465, Ch. C. A.)

The 32nd section of the Act does not give the court jurisdiction under the Act to displace a trustee who is desirous of continuing in the trust: (see *Re Blanchard*, 4 L. T. Rep. N. S. 426; 3 De G. F. & J. 131). But it enables the court to appoint a new trustee in the place of a trustee permanently residing abroad without his consent: (*Re Bignold's Settlement Trusts*, 26 L. T. Rep. N. S. 176; 7 Ch. App. 223.)

For the case of a bankrupt trustee see *post*, p. 137.

See further Morgan, p. 79 *et seq.*, and Hamilton on the Trustee Acts, p. 51 *et seq.*

WHO APPOINTED, AND HOW MANY.

As a rule the court will not appoint a *cestui que trust*, to be a trustee, and near relatives of *cestuis que trust* are also objectionable. Lewin on Trusts, 8th edit., p. 665, and *Wilding v. Bolder* (21 Beav. 222). But see *Tempest v. Lord Camoys* (58 L. T. Rep. N. S. 221; W. N. 88, p. 17), and *Re Lightbody's Trusts* (52 L. T. Rep. N. S. 40; 33 W. R. 452; W. N. 1885, p. 3). The court refused to appoint a solicitor, who was son of and partner with the continuing solicitor trustee: (*Re Norris, Allen v. Norris*, 51 L. T. Rep. N. S. 593; 27 Ch. Div. 333; 53 L. J. N. S. 913, Ch.; 32 W. R. 955.)

As to appointing persons out of the jurisdiction to be trustees, and allowing trustees a commission under special circumstances, see *Re Freeman's Settlement Trusts* (57 L. T. Rep. N. S. 798; 37 Ch. Div. 148; 36 W. R. 71.)

In *Re Hewett's Settlement Trusts* (83 L. T. July 30, 1887, p. 240) under special circumstances the court appointed the solicitor on the record to be a trustee.

In *Re Brogden; Billing v. Brogden* (W. N. 88, p. 238; 86 L. T. 106), Mr. Justice North consented to appoint three persons to be trustees who were nominated by the Trustees, Executors, and Securities Corporation Limited, but declined in any way to recognise the company. Under sect. 32, the court has power to appoint an additional trustee, even though there is no vacancy in the trusteeship: *Re Gregson's Trusts*, 34 Ch. Div. 209; (see also *Re Moore*, 21 Ch. Div. 778); but, *semble*, this is not so under sect. 31 of the Conveyancing Act.

The court usually keeps up the original number of trustees: (*Re Critchley*, 83 L. T. 167; *Re Lamb's Trusts*, 28 Ch. Div. 77; 54 L. J. Ch. 107; 33 W. R. 163; *Re Gardiner's Trusts*, 55 L. T.

Rep. N. S. 261; 33 Ch. Div. 590.) But it sometimes increases, and under special circumstances reduces them. See *Re Fowler's Trusts* (55 L. T. Rep. N. S. 546; W. N. (1886) p. 183). Except under special circumstances it will not discharge a trustee without appointing a new one in his place: (*Davies v. Hodson*, 32 Ch. Div. 225.)

The court is very unwilling to appoint a sole trustee, and it is contrary to the practice of the court to do so when a fund is to be retained for the benefit of infants: (*Re Howson's Policy*, W. N. (1885) p. 213, a case under the Married Womens' Property Act 1870, s. 10.)

See further Morgan, p. 80 *et seq.*

PRACTICE. (a)

Mode of application and parties.

Sect. 37 of the Trustee Act, 1850, is as follows:—

And be it enacted that an order under any of the Persons to hereinbefore contained provisions for the appointment of apply. a new trustee or trustees, or concerning any lands, stock, or *chose in action*, subject to a trust, may be made upon the application of any person beneficially interested in such lands, stock, or *chose in action*, whether under disability or not, or upon the application of any person duly appointed as a trustee thereof: And that an order under any of the provisions hereinbefore contained concerning any lands, stock, or *chose in action* subject to a mortgage, may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the moneys secured by such mortgage.

As to the persons whom the court will appoint trustees see Dan. 2118, and the note to S. L. A. s. 38, *post*.

Now an application for appointment of new trustees will be made by summons even though a vesting order be required. See *ante*, p. 121.

For form of summons see Appendix III., *post*.

But it is apprehended that circumstances might arise which

(a) The order of arrangement of this section has been suggested by that excellent work Chitty's Equity Index, vol. 7, 4th edit., by H. E. Hirst, Esq.

would justify the presentation of a petition, *e.g.*, a large estate, great complication, and questions of difficulty; or the necessity for service out of the jurisdiction, as an originating summons cannot be so served, but *quære*, whether a petition under this Act can be; (see *ante*, p. 89, and Hamilton on the Trustee Acts, p. 72.)

The usual rule is, that all persons beneficially interested must either join in the application or be served: (Dan. 2120; but see *Re Blanchard*, 3 De G. F. & J. 137.)

In *Re Wilson, a Lunatic* (54 L. T. Rep. N. S. 263; 31 Ch. Div. 522; 55 L. J. 368, Ch. C. A.) an order was made without service on a *cestui que trust* in Australia.

It is not necessary to serve an absconding trustee: (*Re Nicholson's Trusts*, W. N. March 22, 1884, p. 76; *Hyde v. Benbow*, W. N. May 10, 1884, p. 117.)

Petitions under the Trustee Acts should specifically refer to the sections of the Acts under which application is made (per Kay, J. in *Re Moss's Trusts*, 37 Ch. Div. 513; and again in *Re Hall's Settlement Trusts*, 58 L. T. Rep. N. S. 76; W. N. (1888), 16):—

It will be convenient to follow this practice in summonses.

Affidavit of Fitness and other Evidence.

For form of affidavit of fitness, see *post*, Appendix III.

“Upon the appointment of a new trustee, one affidavit of fitness by a deponent whose evidence can be relied upon is sufficient, and in future we must disallow the costs of a second affidavit of fitness:” (*Re Arden*, W. N. Aug. 6, 1887, p. 166, on a petition in lunacy and chancery.)

It is not sufficient for the deponent in an affidavit of fitness to describe himself as “gentleman:” (*Re Orde*, 49 L. T. Rep. N. S. 430; 24 Ch. Div. 271; 52 L. J. 832, Ch.; 31 W. R. 801, C. A.; *Re Horwood*, 55 L. T. Rep. N. S. 373; W. N. 1886, p. 139.)

“Public accountant” was held sufficient: (*ib.*)

The affidavit of fitness filed in order to induce the court to appoint new trustees, should show something as to the position of the proposed trustees in respect of their pecuniary means, per Kay, J. in *Re Castle Sterry's Trusts* (W. N. July 28, 1888, p. 179).

An affidavit of fitness made by the solicitor in the matter, is not, as a rule, sufficient: (*Grundy v. Buckridge*, 22 L. J. N. S. 1007, Ch.)

The fact actually giving rise to the application to the court, such as the death of a trustee should be strictly proved, but strict evidence of the other circumstances is not required: (Dan. 2123.)

Where a new trustee is appointed in Chancery as well as in Lunacy, his signature to his consent to act may be verified in

manner provided by Order XXXVIII., r. 19a, *ante*, p. 45, and need not be verified by affidavit according to the old practice.

Secus, where the order is made in Lunacy only: (*Re Hume, a person of unsound mind*, 56 L. T. Rep. N. S. 351; 35 Ch. Div. 457; 56 L. J. 1020, Ch.; 36 W. R. 84, C. A.)

Costs.

Under sect. 51 of the Act, the court has power to order the costs to be paid out of the estate. But apparently the court has no power to order respondents to pay costs, see *Re Primrose*, 23 Beav. 590; see further Hamilton on the Trustee Acts, p. 87, *et seq.*

CONVEYANCING AND LAW OF PROPERTY ACT, 1881 (44 & 45 VICT. c. 41.)

Trust and Mortgage Estates on Death.

Sect. 30 of this Act provides for the devolution of trust and mortgage estates on the death of a trustee or mortgagee solely entitled, to his personal representatives. As it is sometimes necessary to come to the court for the appointment of new trustees, in default of there being a personal representative it is thought convenient to cite the cases on this section.

Vesting orders were made in the following cases: *Re Pilling's Trusts* (26 Ch. Div. 432; 53 L. J. 1052, Ch.); *Re Rackstraw's Trusts* (52 L. T. Rep. N. S. 612; W. N. 1885, p. 73; 33 W. R. 559); *Re Williams' Trusts* (56 L. T. Rep. N. S. 884; 36 Ch. Div. 231; 56 L. J. 1088, Ch.; 36 W. R. 100). In the last case the petition was served on the testator's heir.

We believe that in *Re Bishop of Sarum* (55 L. T. Rep. N. S. 313; W. N. 1886, p. 140), the deaths took place before the Act so that the section did not apply: (85 L. T. 189.)

Where land was vested in infant heir of last surviving trustee, it was held, that infant heir must be served, and guardian *ad litem* was appointed: (*Re Adams*, Kay, J., 57 L. T. Rep. N. S. 337; 35 W. R. 770; W. N. 1887, p. 175.)

In *Re Rackstraw* and *Re Williams* new trustees were appointed. In *Re Pilling* the Court had previously appointed, and then made a fresh vesting order.

For discussion as to where the legal estate is, until a personal representative is appointed, see Wolst. & T., 4th edit., 82; Dart. 6th edit., 684; 85 L. T. 189.

Copyholds.

It was well settled that the Conveyancing Act, s. 30, applied to copyholds: (*Re Hughes*, 76 L. T. 337; *Hall v. Bromley*, 56 L. T.

Rep. N. S. 684; 35 Ch. Div. 642, 651; *Hislop v. Richmond*, 80 L. T. 206.)

But sect. 45 of the Copyhold Act, 1887 (50 & 51 Vict. c. 73), declared that the Conveyancing Act, s. 30, should not apply to copyholds "vested in the tenant on the court rolls of any manor upon any trust or by way of mortgage." As to this see *Re Mills' Trusts* (58 L. T. Rep. N. S. 620; 37 Ch. Div. 312; on appeal, 40 Ch. Div. 15; 37 W. R. 81; 60 L. T. Rep. N. S. 442); *Re Franklyn's Mortgages*, (W. N., Nov. 24, 1888, p. 217).

Trustees and Executors.

31. *Appointment of new trustees, vesting of trust property, &c.*—(1.) Where a trustee, either original or substituted, and whether appointed by a court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for this purpose by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may, by writing, appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, remaining out of the United Kingdom, desiring to be discharged, refusing or being unfit, or being incapable, as aforesaid.

(2.) On an appointment of a new trustee, the number of trustees may be increased.

(3.) On an appointment of a new trustee, it shall not be obligatory to appoint more than one new trustee, where only one trustee was originally appointed, or to fill up the original number of trustees, where more than two trustees were originally appointed; but, except where only one trustee was originally appointed, a trustee shall not be discharged under this section from

his trust unless there will be at least two trustees to perform the trust.

(4.) On an appointment of a new trustee any assurance or thing requisite for vesting the trust property, or any part thereof, jointly in the persons who are the trustees, shall be executed or done.

(5.) Every new trustee so appointed, as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

(6.) The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will, but dying before the testator; and those relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.

(7.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

(8.) This section applies to trusts created either before or after the commencement of this Act.

General Principles of Construction.—"The intention is to substitute the power conferred by sect. 31 for that which is conferred by sect. 27 of Lord Cranworth's Act:" (*Re Walker and Hughes*, 49 L. T. Rep. N. S. 597; 24 Ch. Div. 698.) This section provides for all cases where there is no power in the instrument under which new trustees can be appointed: (per Bagallay, L.J., in *Cecil v. Langdon*, 51 L. T. Rep. N. S. 618; 28 Ch. Div. 1; 33 W. R. 1; 54 L. J. 313, Ch., C. A.).

In *Re Shafte's Trusts* (53 L. T. Rep. N. S. 261; 29 Ch. Div. 247; 54 L. J. 885, Ch.: 33 W. R. 728) Mr. Justice Pearson refused to construe the section so as "to be placing unnecessary difficulties in the way of a very useful statute."

Appointment out of Court—Sub-sect. (1).—It is now improper

to apply to the court to appoint new trustees, unless there is some reason beyond the absence of an express power in the instrument creating the trust: (*John Gibbons' Trusts*, 45 L. T. Rep. N. S. 756.) In the particular case the court made the order, as the petition had been prepared before the Act was passed, and refusal to make the order would throw costs on the petitioners, and probably not save the trust estate.

A settlement, executed in 1878, authorised husband and wife to appoint new trustees, but did not state in what events. Held, that under Conveyancing Act, s. 31, they could appoint when a trustee remained out of the United Kingdom more than twelve months, although this is not an event provided for by Lord Cranworth's Act. In this case Mr. Justice North said: "I think the intention of sect. 31 was that whenever a person had been nominated by the instrument creating the trust as the person to appoint new trustees, he should be the person who should have the power of filling up any vacancy occurring under the provisions of sect. 31:" (*Walker and Hughes* (49 L. T. Rep. N. S. 597; 24 Ch. Div. 698; 53 L. J. 135, Ch.) So in *Re Coates to Parsons* (56 L. T. Rep. N. S. 16; 34 Ch. Div. 370; 56 L. J. 242, Ch.; 35 W. N. 370) the power was held to apply to the case of "going abroad," which was not one of the events mentioned in the instrument, but is mentioned in Conveyancing Act, s. 31.

In the last-mentioned case an objection was taken by a purchaser from trustees that an appointment of one of their number, under Conveyancing Act, s. 31, in the place of one gone abroad for more than twelve months was invalid, because such trustee had not joined in the appointment. Held, that the objection was unsustainable, "there being nothing to show that he was willing or competent to act in the exercise of the power, or even that it was known where he was:" It would seem, from this decision, that no objection can be taken to non-concurrence of a retiring trustee in the appointment of a new one under the Conveyancing Act, unless it be shown that he was willing and competent to act.

A settlement made in 1849 appointed four persons trustees, and provided that if such trustees, or any future trustees to be appointed in place of them, or any of them "as hereinafter mentioned," should die, &c., the surviving or continuing trustees, or trustee, with the consent of X., might appoint new trustees. The original trustees died out, and the Court of Chancery some years ago appointed new trustees. Held, that the surviving trustee could now appoint under the Conveyancing Act, without the consent of X., as the power in the settlement came to an end when new trustees were appointed by the court: (*Cecil v. Langdon*, 51 L. T. Rep. N. S. 618; 28 Ch. Div. 1; 54 L. J. 313, Ch.; 33 W. R. 1, C. A.

A private estate Act passed in 1869 incorporated Lord Cranworth's Act, s. 27, but provided that every new trustee should be appointed with the sanction of the court. Held, that the qualification was gone, and that trustees could be appointed, without the court, under Conveyancing Act, s. 31: (*Re Lloyd's Trusts*, W. N., Feb. 4, 1888, p. 20).

The executors of a sole trustee can exercise the power of appointing new trustees given by Conveyancing Act, s. 31 (*Re Shafto's Trusts*, 53 L. T. Rep. N. S. 261; 29 Ch. Div. 247); but they are not bound to exercise it (see *Knight's Trusts* below). *Re Blake* (cited below) is also an instance where the appointment of trustees might have been made out of court, yet the application to the court was considered reasonable.

Abseonding Trustee.—It is doubtful whether an absconding trustee is "unfit to act," so as to admit of a new trustee being appointed in his place under the Conveyancing Act, but see *Re Keeley's Trusts* (53 L. T. Rep. N. S. 487) and *Re Prynne's Settlement* (83 L. T. 259). Where two persons with power to appoint new trustees cannot agree, see *Re Sheppard*, *ante*, p. 123.

Application to the Court held allowable.—The tenant for life of a trust fund asked the trustees (executors of a previous trustee) to execute a power of attorney enabling her to obtain payment of dividends, and subsequently to appoint new trustees under this Act. They did not do either of these things. Accordingly the *cestuis que trust* presented a petition for appointing new trustees, and for transfer of stock. Held, by Mr. Justice Pearson, that the executors had conducted themselves vexatiously, and must pay costs which would have been incurred on petition for payment of dividend only, and should receive no costs; but they were not ordered to pay the whole costs, as they, being only trustees in their capacity of executors, were not bound to exercise the power given them by the Conveyancing Act, s. 31: (*Knight's Trusts*, 49 L. T. Rep. N. S. 774; 26 Ch. Div. 82.)

The learned judge said there were many cases where persons who are simply representatives of a deceased trustee may be properly advised to do nothing to make themselves trustees.

On an appeal with reference to the costs, the Court of Appeal gave the trustees their costs, but not costs of appeal. No question was raised as to the correctness of the judgment as to the Conveyancing Act: (*Knight's Trusts*, 50 L. T. Rep. N. S. 550; 26 Ch. Div. 90.)

One of the two trustees appointed by the court under sect. 38 of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), for the purposes of that Act, desired to retire, and an application was made to the court under the same section for the appointment of a new trustee in the

place of the one so retiring. Held, that it was very doubtful whether new trustees for the purposes of the Settled Land Act could be appointed out of court under Conveyancing Act, s. 31, and the application to the court was therefore justifiable, and the costs of it would be allowed: (*Re Wilcock*, 56 L. T. Rep. N. S. 629; 34 Ch. Div. 508.)

In *Re Kane's Trust* (21 L. Rep. Ir. 112) one of three trustees appointed by the court had gone to reside abroad, and the court appointed a new trustee for the purposes of the Act in his place under the Settled Land Act, 1882, s. 38, following *Re Wilcock* (56 L. T. Rep. N. S. 629; 34 Ch. Div. 508), a doubt having been raised whether such an appointment could be made under Conveyancing Act, s. 31.

A will, made before the Conveyancing Act, gave the power of appointing new trustees conferred by 23 & 24 Vict. c. 145, s. 27, to E. B., who was also one of the trustees. She became of unsound mind. Held, that the appointment of a new trustee in her place could be made under the Conveyancing Act by the other trustees, but under the circumstances the court directed that the appointment should be made in the matter of the lunacy under sect. 137 of the Lunacy Regulation Act, 1853, and desired the committee to make an application under that Act: (*Re Elizabeth Blake*, W. N., Aug. 13, 1887, p. 173.)

A., by will appointed an infant one of his trustees. A petition was presented to the court for the appointment of a new trustee in his place, on the ground that the Conveyancing Act, s. 31, which gives a power to appoint in the place of a trustee who is incapable of acting in the trusts, did not apply. Pearson, J. held that the power in the Act did not apply to the case of an incapacity which the testator knew of and did not intend to prevent the trustee he appointed from acting; and made the appointment without prejudice to the infant's applying to be reappointed when he attained twenty-one: (*Re Tallatire's Trusts*, 80 L. T. 26; W. N. Nov. 14, 1885, p. 191.)

Where the settlement gave the power to the husband and wife to appoint new trustees, and the wife had obtained a judicial separation, and the husband had been for some years resident in Australia the court appointed: (*Re Somerset*, W. N., June 18, 1887, p. 122.)

Sub-sect. (2).—Semble, that the power hereby given, on appointments made out of court, to increase the number of trustees, only arises when an appointment is being made to supply a vacancy in the trusteeship. But the court, under sect. 32 of the Trustee Act, 1850, can appoint an additional trustee, although there is no vacancy: (*Re Gregson's Trusts*, 34 Ch. Div. 209; 56 L. J. 286, Ch.; 35 W. R. 286.) In *Re Nesbitt's Trusts* (19 L. Rep.

1r. 509)—which we propose to cite in connection with sect. 5 of the Conveyancing Act, 1882—the Irish M. R. “distinguished” *Re Gregson*.

Sub-sect. (3).—It was held that it was not obligatory to keep up the original number of trustees in *Re Coates to Parsons* (56 L. T. Rep. N. S. 16; 34 Ch. Div. 370.)

Sub-sect. (6).—It was stated by counsel in argument in *Re Orde* (49 L. T. Rep. N. S. 430; 24 Ch. Div. 271) that the Conveyancing Act, s. 31, did not appear to be applicable where all the trustees died before the testator; and the court accordingly in that case appointed trustees. See also *Re Lightbody's Trusts* (78 L. T. 150; W. N., Jan. 17, 1885, p. 3). Mr. Vaizey remarks (p. 1360) that this enactment (sub-sect. (6) must have escaped notice when it was stated by counsel, and seems to have been assumed by the court, that sect. 31 is not applicable in a case where the trustees of a will have died before the testator. These cases were followed by Kay, J. in *Re Ambler's Trusts* (59 L. T. Rep. N. S. 210), but without approval.

Sub-sect. (7).—The model deed of trust for Wesleyan chapels provides for the appointment of new trustees in events not including absence from the United Kingdom, at a formal meeting of trustees. Held, that this did not show “contrary intention,” so as to exclude the Conveyancing Act in such a case of absence: (*Re Coates to Parsons*, 56 L. T. Rep. N. S. 16, 19; 34 Ch. Div. 370.)

The Practice of the Court unaltered.—Where one of several trustees is of unsound mind the court will not reappoint the other trustees in the place of themselves and the lunatic trustee for the purpose of excluding the lunatic trustee from the trust; but a new trustee must be appointed in his place. The Conveyancing Act, s. 31, is not intended to alter the practice of the court: (*Re Aston*, 48 L. T. Rep. N. S. 195; 23 Ch. Div. 217.) And see *Re Collyer* (43 L. T. Rep. N. S. 454), and *Lamb's Trusts* (28 Ch. Div. 77.)

It should be stated that an order was made vesting the property in the continuing trustees in *Re Martyn* (50 L. T. Rep. N. S. 552; 26 Ch. Div. 745), where the fund was immediately divisible; and in *Davies v. Hodgson* (32 Ch. Div. 225), where there was to be immediate payment into court; but these were exceptional cases, and the general rule is otherwise. It is clear from the cases that the practice, as to this point, is not altered by the Conveyancing Act, s. 31; and see *Re Gardiner's Trusts* (55 L. T. Rep. N. S. 261; 33 Ch. Div. 590; 55 L. J. 714, Ch.; 35 W. R. 28, and the cases there cited: *Re Dewhirst's Trusts* (55 L. T. Rep. N. S. 427; 33 Ch. Div. 416; 55 L. J. 842, Ch.; 35 W. R. 147,

C. A.); but see *Re Hulme* (57 L. T. Rep. N. S. 13); *Re Vicat, Unsound Mind* (54 L. T. Rep. N. S. 891; 33 Ch. Div. 103; 55 L. J. 843 n., Ch.; 34 W. R. 645, C. A.)

[Sect. 32 provides for the retirement of a trustee without a successor being appointed where there are more than two trustees.]

[Sect. 33 defines the powers of trustees appointed by the court.]

34. *Vesting of trust property in new or continuing trustees.*—(1.) Where a deed by which a new trustee is appointed to perform any trust contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover and receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in those persons, as joint tenants, and for the purposes of the trust, that estate, interest or right.

(2.) Where a deed by which a retiring trustee is discharged under this Act contains such a declaration as is in this section mentioned by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees, that declaration shall, without any conveyance or assignment, operate to vest in the continuing trustees alone, as joint tenants, and for the purposes of the trust, the estate, interest, or right to which the declaration relates.

(3.) This section does not extend to any legal estate or interest in copyhold or customary land, or to land conveyed by way of mortgage for securing money subject to the trust, or to any such share, stock, annuity, or property as is only transferable in books kept by a company or other body, or in manner prescribed by or under Act of Parliament.

(4.) For purposes of registration of the deed in any registry, the person or persons making the declaration shall be deemed the conveying party or parties, and the

conveyance shall be deemed to be made by him or them under a power conferred by this Act.

(5.) This section applies only to deeds executed after the commencement of this Act.

A husband and wife having power to appoint new trustees of a marriage settlement appointed a new trustee in the place of one who had absconded abroad, and jointly with the continuing trustee. The trustee who had absconded declined to join in the appointment and to execute the necessary transfer. The property subject to the trusts of the settlement consisted of policies of insurance and mortgages. It became, therefore, impracticable, having regard to Conveyancing Act, 1881, s. 34 (3), to vest such property in the trustees without the assistance of the court. A petition for a vesting order was accordingly presented, under the Trustee Acts, 1850 and 1852, by the husband and wife and the continuing trustee.

Held, that the order asked for might be made, but that the petition must be amended by adding the name of the proposed new trustee as a co-petitioner: (*Re Keeley's Trusts*, 53 L. T. Rep. N. S. 487.)

A husband and wife, having power to appoint new trustees of a marriage settlement, appointed one in the place of a trustee who had absconded abroad and jointly with the continuing trustee. The property included mortgages. A petition for a vesting order under the Trustee Act, 1850, ss. 10, 22, was presented by the husband, wife, the continuing trustee, and the new trustee. The infant children of the marriage were not parties. Held, that the order asked for might be made, but that the trustees must be appointed to represent the interests of the infant children beneficially entitled in remainder under the settlement: (*Re Prynne's Settlement*, 83 L. T. 259.)

New trustees were appointed, under a power, in the place of two trustees who had become bankrupt and left the country. The trust estate consisted of a legal mortgage of real estate and shares or stock within sub-sect. (3). The court made a vesting order: (*Re Harrison's Settlement Trusts*, W. N., Feb. 24, 1883, p. 31.)

By the Conveyancing Act, 1882 (45 & 46 Viet. c. 39), s. 5 :—

(1.) On an appointment of new trustees, a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property; or, if only one trustee was originally appointed, then one

separate trustee may be so appointed for the first-mentioned part.

(2.) This section applies to trusts created either before or after the commencement of this Act.

A testator devised properties, in two different parishes, in strict settlement, in favour of different families, and appointed two trustees of the whole. One trustee having died, a petition was presented for the appointment of two new trustees to act with the surviving trustee as to one property. Held, that the court could appoint under this section, though the surviving trustee was trustee for both parties. "There is nothing to prevent the surviving trustee being a member of two bodies of trustees, or trustee of one estate alone, and of another in conjunction with others:" (*Re Paine's Trusts*, 52 L. T. Rep. N. S. 323; 28 Ch. Div. 725; 54 L. J. Ch. 735; 33 W. R. 564).

Under the trusts of a will, different parts of the testator's property were subject to distinct trusts, but in a certain event the trusts would coalesce. Held, that there was power in the court to appoint separate sets of trustees for the different parts of the property: (*Re Hetherington's Trusts*, 55 L. T. Rep. N. S. 807; 34 Ch. Div. 211; 56 L. J. 174, Ch.; 35 W. R. 285).

It was held by Mr. Justice North, on application by Originating Summons, that sub-sect. (1) authorises the appointment, by trustees, out of court, of a separate set of trustees for a part of the trust property held on distinct trusts, *only* when an appointment is being made of new trustees of the whole property: (*Savile v. Couper*, 56 L. T. Rep. N. S. 907; 36 Ch. Div. 520; 56 L. J. 980, Ch.; 35 W. R. 829.)

"This decision is binding on me, even if I should have been inclined to give a wider interpretation to the section:" (per Kay, J., in *Re Moss's Trusts*, *ubi inf.*)

In *Re Nesbitt's Trusts* (19 L. Rep. Ir. 509) it was held by the Irish Master of the Rolls, on a petition under the Trustee Acts and under the Conveyancing Acts, that C. A., sect. 5, sub-sect. (1), does not authorise the appointment of a separate set of trustees for a part of the trust property held on distinct trusts, except on the appointment of new trustees of the entire property. The decision of the Master of the Rolls was affirmed on appeal, though the Court of Appeal did not decide the question of jurisdiction. In this case, the sole trustee of a will, who had acted and was in no way personally disqualified, wished to be discharged from the trusts of a particular fund part of the trust property, and said he would pay it into court unless new trustees of it were appointed. Under these

circumstances, the Master of the Rolls held there was no "expendiency," in a legal sense, for the appointment of a new trustee, and that the case did not fall within sect. 32 of the Trustee Act, 1850, but said that he would have granted the application if he could. The judgment of the Irish Court of Appeal runs thus: "Whether there is a jurisdiction or not, we think this case is one in which we should not interfere with the order of the Master of the Rolls." This decision was given before *Savile v. Couper*, and is therefore an independent authority for the point there decided. The Irish Master of the Rolls seems to have taken a narrower view of the Trustee Act than the English court does. See *Re Moss* next cited.

A testator appointed three persons trustees and executors for carrying out trusts of two specified sums bequeathed by him, and also the trusts of his real and residuary personal estate. The will contained a power of sale and power for surviving or continuing trustees to appoint new trustees. The will was proved by two trustees, the third renouncing. The trustees wished to be relieved from the trusts of the two sums, but would continue trustees otherwise. Held, that the court under the powers of the Trustee Acts, independently of Conveyancing Act, 1882, s. 5, could allow the trustees to retire from the trusts of the sums without requiring the appointment of a new trustee to act in the trusts of the residue: (*Re Moss's Trusts*, 58 L. T. Rep. N. S. 468; 37 Ch. Div. 513).

This decision does not conflict with *Savile v. Couper*, which only dealt with an appointment by the trustees, not by the court.

THE BANKRUPTCY ACT, 1883 (46 & 47 VICT. c. 52), s. 147.

147. Where a bankrupt is a trustee within the Trustee Act, 1850, sect. 32 of that Act shall have effect so as to authorise the appointment of a new trustee in substitution for the bankrupt (whether voluntarily resigning or not), if it appears expedient to do so, and all provisions of that Act, and of any other Act relative thereto, shall have effect accordingly.

In *Re Foster* (55 L. T. Rep. N. S. 479) a trustee was removed, although he had obtained discharge and some of the beneficiaries wished to retain him. In *Re Mace's Trusts* (W. N., Dec. 10, 1887, p. 232) two trustees were appointed sole trustees and the third trustee, who had become bankrupt and had absconded was removed, it being shown to be perfectly impossible to obtain a new trustee in his place. They were the largest creditors of the bankrupt.

See also *Re Adam's Trusts* (12 Ch. Div. 634).

CHAPTER XI.

INTERPLEADER.

APPLICATIONS for relief by way of Interpleader are for the most part made by ordinary summons in an action already brought; but as it is considered that under the following order such relief can be obtained before any action is commenced (see *post*, p. 139), and as the mode of obtaining such relief in that case would be by Originating Summons, it has been thought necessary to include the subject in the present work.

For fuller information thereon, see Chitty Arch. 1354-1377; Wilson, 429; Seton, 361 *et seq.*; and Dan. 1515 *et seq.*

ORDER LVII.

Interpleader.

1. Relief by way of interpleader may be granted,—
 - (a.) Where the person seeking relief (in this Order called the applicant) is under liability for any debt, money, goods, or chattels, for or in respect of which he is, or expects to be, sued by two or more parties (in this Order called the claimants) making adverse claims thereto :
 - (b.) Where the applicant is a sheriff or other officer charged with the execution of process by or under the authority of the High Court, and claim is made to any money, goods, or chattels taken or intended to be taken in execution under any process, or to the proceeds or value of any such goods or chattels by any person other than the person against whom the process issued.

As the old Interpleader Act (1 & 2 Will. 4, c. 58), and the sections of the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126) relating to Interpleader (except sect. 17) were repealed by 46 & 47 Vict. c. 49: (see Chitty's Arch. 1354), the practice is now regulated by this order, by which the old practice of the Court

of Chancery is modified : (see judgment of Wills, J. in *Reading v. School Board for London*, 54 L. T. Rep. N. S. 678; 16 Q. B. Div. 686; 34 W. R. 609.)

Having regard to the words "or expects to be sued" in the above order, it seems that an Originating Interpleader Summons could now be issued before any action had been commenced. See Dan. F., p. 678 (note e); Chitty's Forms, p. 691 (note a); and *Re New Hamburg and Brazilian Railway Company* (W. N. 1875, p. 239). And see Judicature Act, 1873, sect. 25, sub-sect. 6, as to a debtor or trustee, with notice of conflicting claims to a debt; and *Reading v. School Board for London*; *C. Hopkinson and Son, claimants* (*supra*). It has been decided that a foreigner may be served with an interpleader summons (taken out in an action) out of the jurisdiction : (see *The Credits Gerundense Limited v. Van Weede*; 12 Q. B. Div. 171; 53 L. J. 142, Q. B.; 32 W. R. 414; 48 J. P. 184.)

For forms of summons, &c., see Dan. F. 1574, *et seq.*; and Chitty's Forms, p. 690-704.

The text of sect. 17 is as follows:—

"The judgment in any such action or issue as may be directed by the court or judge in any interpleader proceedings, and the decision of the court or judge in a summary manner, shall be final and conclusive against the parties, and all persons claiming by, from, or under them."

2. The applicant must satisfy the court or a judge by affidavit or otherwise—

- (a.) That the applicant claims no interest in the subject-matter in dispute, other than for charges or costs; and
- (b.) That the applicant does not collude with any of the claimants; and
- (c.) That the applicant is willing to pay or transfer the subject-matter into court or to dispose of it as the court or a judge may direct.

As to collusion, see *Thompson v. Wright* (51 L. T. Rep. N. S. 634; 13 Q. B. Div. 632.)

3. The applicant shall not be disentitled to relief by Common title. reason only that the titles of the claimants have not a common origin but are adverse to and independent of one another.

- Time.** 4. Where the applicant is a defendant, application for relief may be made at any time after service of the writ of summons.
- Summons.** 5. The applicant may take out a summons calling on the claimants to appear and state the nature and particulars of their claims, and either to maintain or relinquish them.
- Stay.** 6. If the application is made by a defendant in an action the court or a judge may stay all further proceedings in the action.
- What order made.** 7. If the claimants appear in pursuance of the summons, the court or a judge may order either that any claimant be made a defendant in any action already commenced in respect of the subject-matter in dispute in lieu of or in addition to the applicant, or that an issue between the claimants be stated and tried, and in the latter case may direct which of the claimants is to be plaintiff, and which defendant.
- Summary decision.** 8. The court or a judge may, with the consent of both claimants or on the request of any claimant, if, having regard to the value of the subject-matter in dispute, it seems desirable so to do, dispose of the merits of their claims, and decide the same in a summary manner and on such terms as may be just.
- A summary decision under this rule by a judge at chambers is final, and no appeal lies from such decision, and there is no power to give leave to appeal. *Lyon v. Morris and another*; *Mutual Loan Fund Association, claimants* (57 L. T. Rep. N. S. 324; 19 Q. B. Div. 139; 56 L. J. 378, Q. B.; 35 W. R. 707, C. A.); and see *Re Roberts*; *Evans v. Thomas* (W. N. 1887, p. 231).
- Question of law.** 9. Where the question is a question of law, and the facts are not in dispute, the court or a judge may either decide the question without directing the trial of an issue, or order that a special case be stated for the opinion of the court. If a special case is stated, Order XXXIV. shall, as far as applicable, apply thereto.

10. If a claimant, having been duly served with a summons calling on him to appear and maintain, or relinquish, his claim, does not appear in pursuance of the summons, or, having appeared, neglects or refuses to comply with any order made after his appearance, the court or a judge may make an order declaring him, and all persons claiming under him, for ever barred against the applicant, and persons claiming under him, but the order shall not affect the rights of the claimants as between themselves.

When claimant barred.

11. Except where otherwise provided by statute, the judgment in any action or on any issue ordered to be tried or stated in an interpleader proceeding, and the decision of the court or a judge in a summary way, under rule 8 of this Order, shall be final and conclusive against the claimants, and all persons claiming under them, unless by special leave of the court or judge, as the case may be, or of the Court of Appeal.

Decision when conclusive.

See sect. 17 of the Common Law Procedure Act, 1860, and *Lyon v. Morris*, and *Re Roberts*, *ante*, pp. 139, 140.

12. When goods or chattels have been seized in execution by a sheriff or other officer charged with the execution of process of the High Court, and any claimant alleges that he is entitled, under a bill of sale or otherwise, to the goods or chattels by way of security for debt, the court or a judge may order the sale of the whole or a part thereof, and direct the application of the proceeds of the sale in such manner and upon such terms as may be just.

Sheriff, &c

13. Orders XXXI. and XXXVI. shall, with the necessary modifications, apply to an interpleader issue; and the court or judge who tries the issue may finally dispose of the whole matter of the interpleader proceedings, including all costs not otherwise provided for.

Application of Orders XXXI., XXXVI.

For Order XXXI., see *ante*, p. 28. Order XXXVI. relates to "Trial."

One order in
several
matters.

14. Where in any interpleader proceeding it is necessary or expedient to make one order in several causes or matters pending in several divisions, or before different judges of the same division, such order may be made by the court or judge before whom the interpleader proceeding may be taken, and shall be entitled in all such causes or matters; and any such order (subject to the right of appeal) shall be binding on the parties in all such causes or matters.

Costs, &c.

15. The court or a judge may, in or for the purposes of any interpleader proceedings, make all such orders as to costs and all other matters as may be just and reasonable.

As to costs, see *Hansen v. Maddox* (12 Q. B. Div. 100; 50 L. T. Rep. N. S. 123; 53 L. J. 67, Q. B.; 32 W. R. 183); *Tomlinson v. Land and Finance Corporation Limited* (14 Q. B. Div. 539, C. A.; 53 L. J. 561, Q. B.); and *Rhodes v. Dawson, Rush, and Co., Claimants* (16 Q. B. Div. 548; 55 L. J. 134, Q. B.; 34 W. R. 241, C. A.)

CHAPTER XII.

APPEAL.

PART I.

It is hardly necessary to say that the order of the court or a judge upon an originating summons is subject to appeal, and may be, and sometimes is, taken up to the House of Lords. As there is little, if anything, peculiar to an appeal from an order of the *Court* upon an Originating Summons as distinguished from any other appeal, that portion of the subject is not treated of so fully in the present work as the law and practice exclusively applicable to originating summons.

Appeals from Chambers.

Appeals from chambers are governed by sects. 49 & 50 of the Judicature Act, 1873 (36 & 37 Vict. c. 66) which are as follows :

Sect. 49. No order made by the High Court of Justice or any judge thereof by the consent of parties, or as to costs only, which by law are left to the discretion of the court, shall be subject to any appeal, except by leave of the court or judge making such order. Judicature Act.

Sect. 50. Every order made by a judge of the said High Court in chambers, except orders made in the exercise of such discretion as aforesaid, may be set aside or discharged upon notice by any Divisional Court, or by the judge sitting in court, according to the course and practice of the division of the High Court to which the particular cause or matter in which such order is made may be assigned, and no appeal shall lie from any such order to set aside or discharge which no such

motion has been made unless by special leave of the judge by whom such order was made or of the Court of Appeal.

Direct from
chambers to
C. A.

As to appeals from a judge in chambers in the Chancery Division, the practice is not uniform.

According to the judgment of Cotton, L. J., in *Re Elsom*, an order made by a judge of the Chancery Division personally in chambers may be appealed from direct to the Court of Appeal without any certificate from the judge of first instance that he does not desire to hear any further argument if such certificate has not been obtained: (*Re Elsom*; *Thomas v. Elsom*, 6 Ch. Div. 346; 25 W. R. 871; and see *Northampton Coal, Iron, and Waggon Company v. Midland Waggon Company*, 38 L. T. Rep. N. S. 82; 7 Ch. Div. 500; 26 W. R. 485.) But the Court of Appeal would require to be satisfied that the judge did not desire to hear any further argument: (*Re Elsom*, M. R.) As a rule when parties wish to appeal from an order made in chambers, they should inform the judge of their intention, so that he may either adjourn the case into court for argument, or deliver a judgment which will enable the Court of Appeal to understand the reasons which have influenced his mind. *Ib.* M. R.

The following is the practice of Mr. Justice Kay and of Mr. Justice North. If all parties concerned have been represented by counsel in chambers, and any one wishes to appeal, the chief clerk, as a rule, will give a certificate that, the case having been fully argued before the judge, he does not desire to have any further argument: (Form of Certificate, *post*, Appendix III., and Dan. F. 1141; see *Attorney-General v. Llewellyn*, 84 L. T. 21, Kay, J.; and *Re Sion College*; *Ex parte Mayor and Corporation of London*, 55 L. T. Rep. N. S. 589, 590.)

If all parties have not been represented by counsel in chambers, the proper practice is to move the judge in court to discharge the order: (see sect. 50 of Judicature Act, 1873, *ante*, p. 143, and *Re Somerville*; *Downes v. Somerville*, 56 L. T. Rep. N. S. 424; and W. N. 1887, p. 79, Kay, J.)

But the practice of Mr. Justice Chitty, according to the case of *Holloway v. Cheston* (19 Ch. Div. 516; 51 L. J. 208, Ch.; 30 W. R. 120) when an appeal from chambers is desired, is to adjourn the summons into court for argument or judgment. If there is no such adjournment, a motion should be made in court to set aside the order made in chambers. And see *Manchester Val De Travers Paving Company Limited v. Slagg and others* (47 L. T. Rep. N. S. 556, C. A.)

Holloway v. Cheston was not followed by Hall, V.C. in *Re Butler's Wharf Company*, (21 Ch. Div. 131; 51 L. J. 294, Ch.; 30 W. R. 723), but it is submitted that the latter case cannot be regarded as governing the practice of the present day.

If an adjournment into court is desired, the request for it should be made before the judge commences to hear the summons: (see *Adjournment into court.* *Holloway v. Cheston*, *supra*, and *Re Munns and Longden*, 50 L. T. Rep. N. S. 356; 32 W. R. 675; W. N. 1884, p. 117, though sometimes an adjournment into court will be ordered during the argument.

The following useful extract as to the practice in chambers is taken from the judgment of Kay, J. in *Munns v. Longden*, *Practice in chambers.* *supra*.

"This is a case of some importance, as regards the practice in chambers, which, simple as it is, seems to be constantly misunderstood. It often occurs when a matter has been before the judge in chambers, and he has given his decision upon it, that he is asked to adjourn it into court. It could, as a matter of course, be adjourned before it has been heard by the judge, upon the application of either party, but afterwards there is no regular mode of adjourning it. The course then is to apply, as provided by sect. 50 of the Judicature Act, 1873, to have the order made in chambers 'set aside or discharged upon notice by any divisional court, or by the judge sitting in court, according to the course and practice of the division of the High Court to which the particular cause or matter . . . may be assigned.' The question here is, whether, the judge having heard the matter personally in chambers and made his order upon it, he can now, on a motion to charge that order, receive further evidence as to the merits of the case, which was not before him when the order was made. There is, so far as I know, no authority that further evidence may be admitted under such circumstances. I have never heard of any rule, or course of practice, under which it could be, and the registrar, whom I have asked, tells me that he knows of none. If I were to receive this evidence now, I should be doing what no section, or order, or apparently any course of practice, warrants, and I should be the first judge to do it. When a judge has heard a summons in chambers, and given his opinion upon it, it would be dangerous after that when the weak points in the case had been brought to light to allow further evidence to be given, and even if a judge had power to allow it, he ought not, in my opinion, to do so, and in the absence of any authority or precedent I certainly will not. If it were to be open to a judge to do so, it would become a question not merely of discharging but of reviewing the order made in chambers, and before the court can admit further evidence on an application to review, it

has to be completely satisfied that evidence could not have been given before."

And see *Re Rouse*; *Rouse v. Tribble* (59 L. T. Rep. N. S. 887; W. N. 1889, p. 38).

Motion to
discharge
order in
chambers.

It has been decided in *Heatley v. Newton* (45 L. T. Rep. N. S. 455; 19 Ch. Div. 326; 51 L. J. 225, Ch.; 30 W. R. 72, C. A.), that a motion to a judge in court under the Judicature Act, 1873, s. 50, to discharge an order made by him in chambers should be made within twenty-one days from the drawing-up of the order, unless the order is simply a refusal of an application, in which case the twenty-one days must be reckoned from the refusal. Although the R. S. C. 1883, contain no express provision limiting the time within which such a motion should be made, the time prescribed by Order LVIII., r. 15, *post*, p. 152, should by analogy be adopted, and the rule laid down in *Heatley v. Newton* (*supra*), as to the periods from which time is to be reckoned is to be taken as modified by analogy to the rules now in force, and it has been held that such period should be the time when the order was pronounced, or when the appellant first had notice thereof: (*Re Woodbridge*, W. N. 1884, 187, Chitty, J.; *Re Hardwidge*, 52 L. T. Rep. N. S. 40; W. N. 1884, p. 204, Kay, J.; and see *Re Lewis*; *Lewis v. Williams*, 54 L. T. Rep. N. S. 198; 31 Ch. Div. 623; 34 W. R. 420).

Having regard to the want of uniformity in the practice on appeals from a judge in chambers in the Chancery Division, the practitioner is recommended to inquire of one of the principal clerks in the judge's chambers, which practice is adopted there before taking steps to appeal.

PART II.

APPEALS FROM ORDERS MADE IN COURT.

Order LVIII.—Appeals to the Court of Appeal.

Mode of
appealing.

1. All appeals to the Court of Appeal shall be by way of rehearing, and shall be brought by notice of motion in a summary way, and no petition, case, or other formal proceeding other than such notice of motion shall be necessary. The appellant may by the notice of motion appeal from the whole or any part of any judgment or order, and the notice of motion shall state whether the whole or part only of such judgment or order is complained of, and in the latter case shall specify such part.

An appeal from an order of the High Court of Justice, Chancery Division (or of a judge at chambers in that division where no further argument is required by him, or where a direct appeal lies to the Court of Appeal from him, see *ante*, p. 144) upon originating summons is brought by notice of motion in the same manner as an appeal from an order in an action commenced by writ.

For forms of notice of motion see *post*, Appendix III.

2. The notice of appeal shall be served upon all parties directly affected by the appeal, and it shall not be necessary to serve parties not so affected; but the Court of Appeal may direct notice of the appeal to be served on all or any parties to the action or other proceeding, or upon any person not a party, and in the meantime may postpone or adjourn the hearing of the appeal upon such terms as may be just, and may give such judgment and make such order as might have been given or made if the persons served with such notice had been originally parties. Any notice of appeal may be amended at any time as the Court of Appeal may think fit.

Service of
notice.

In a proper case the court of Appeal has jurisdiction to make an order for substituted service of a notice of appeal, though no express provision to that effect is contained in the Rules of Court; (*Ex parte Warburg*; *Re Whalley*, 49 L. T. Rep. N. S. 243; 24 Ch. Div. 364, C. A.)

3. Notice of appeal from any judgment, whether final or interlocutory or from a final order shall be a fourteen days notice, and notice of appeal from any interlocutory order shall be a four days notice.

Length of
notice.

By sect. 12 of the Judicature Act, 1875 (38 & 39 Vict. c. 77):

“Every appeal to the Court of Appeal shall, where the subject-matter of the appeal is a final order, decree, or judgment, be heard before not less than three judges of the said court sitting together, and shall, when the subject-matter of the appeal is an interlocutory order, decree, or judgment, be heard before not less than two judges of the said court sitting together.

“Any doubt which may arise as to what decrees, orders, or judgments are final and what are interlocutory, shall be determined by the Court of Appeal.

“ Subject to the provisions contained in this section the Court of Appeal may sit in two divisions at the same time.”

It will be observed that a notice of appeal from any *judgment*, whether final or interlocutory, is a fourteen days' notice.

As we have already seen, *ante*, p. 3, an Originating Summons taken out under Order LV., r. 3, is a civil proceeding commenced otherwise than by writ in manner prescribed by a rule of court, and is consequently an action within the definition of that word in sect. 100 of the Judicature Act, 1873.

Therefore an order dismissing such a summons is a final order (see *Re Fawsitt*; *Galland v. Burton*, 53 L. T. Rep. N. S. 271; 30 Ch. Div. 231; 54 L. J. 1131, Ch.; 34 W. R. 26, C. A.), and a fourteen days notice of appeal would be necessary.

No definition is given of a final or interlocutory order. An order determining the rights of the parties would be a final order: (see *Re Stockton Iron Furnace Company*, 40 L. T. Rep. N. S. 19; 48 L. J. 417, Ch.; 10 Ch. Div. 349; 27 W. R. 433, C. A.; and see cases collected at Wilson, p. 445.)

Speaking with some generality, orders made upon the hearing of originating summonses would be final orders, and a fourteen days notice of appeal would be necessary. But interlocutory orders may be made in the course of an action commenced by originating summons, as in any other action: (see *Re Lewis*; *Lewis v. Williams*, 54 L. T. Rep. N. S. 198; 31 Ch. Div. 623; 34 W. R. 420, C. A.)

Fresh
evidence.

4. The Court of Appeal shall have all the powers and duties as to amendment and otherwise of the High Court, together with full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner. Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought. Upon appeals from a judgment after trial or hearing of any cause or matter upon the merits, such further evidence (save as to matters subsequent as aforesaid) shall be admitted on special grounds only, and not without special leave of the Court. The Court of Appeal shall

have power to draw inferences of fact, and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require. The powers aforesaid may be exercised by the said court, notwithstanding that the notice of appeal may be that part only of the decision may be reversed or varied, and such powers may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision. The Court of Appeal shall have power to make such order as to the whole or any part of the costs of the appeal as may be just.

An appellant who wishes to adduce further evidence on the hearing of an appeal should give to the other side notice of his intention to apply at the hearing of the appeal for leave to produce such evidence: (*Hastie v. Hastie*, 34 L. T. Rep. N. S. 13; 1 Ch. Div. 562; 45 L. J. 298, Ch.; 24 W. R. 564, C. A.)

As a rule such notice should be given along with and at the foot of the notice of appeal (see *Re Chennell*; *Jones v. Chennell*, 38 L. T. Rep. N. S. 494; 8 Ch. Div. 492, 505; 47 L. J. 80, Ch.; 26 W. R. 595, C. A.), unless fresh witnesses have to be examined, in which case the application should be by motion previously to the hearing of the appeal: (*Dicks v. Brooks*, 13 Ch. Div. 652, C. A.; 28 W. R. 525.) The notice should specify the grounds for adducing further evidence. For form of notice see *post*, Appendix III. and Dan. F. 1466. Where no evidence is adduced in court below, see *Arnison v. Smith*, 41 Ch. Div. 98, C. A.

5. If upon hearing of an appeal, it shall appear to the **New trial.** Court of Appeal that a new trial ought to be had, it shall be lawful for the said Court of Appeal, if it shall think fit, to order that the verdict and judgment shall be set aside, and that a new trial shall be had.

6. It shall not, under any circumstances, be necessary **Cross appeal.** for a respondent to give notice of motion by way of cross appeal, but if a respondent intends, upon the hearing of the appeal, to contend that the decision of the court below should be varied, he shall within the time specified

in the next rule, or such time as may be prescribed by special order, give notice of such intention to any parties who may be affected by such contention. The omission to give such notice shall not diminish the powers conferred by the Act upon the Court of Appeal, but may, in the discretion of the court, be ground for an adjournment of the appeal, or for a special order as to costs.

Notice.

7. Subject to any special order which may be made, notice by a respondent under the last preceding rule shall in the case of any appeal from a final judgment be an eight days notice, and in the case of an appeal from an interlocutory order a two days notice.

Papers for
appeal.

8. The party appealing from a judgment or order shall produce to the proper officer of the Court of Appeal the judgment or order or an office copy thereof, and shall leave with him a copy of the notice of appeal to be filed, and such officer shall thereupon set down the appeal by entering the same in the proper list of appeals, and it shall come on to be heard according to its order in such list, unless the Court of Appeal or a judge thereof shall otherwise direct, but so as not to come into the paper for hearing before the day named in the notice of appeal.

An appeal must be entered with the proper officer of the Court of Appeal before the day mentioned in the notice of appeal for the hearing, or if that day happens to be in a vacation when the office is closed, then before the next day of the sitting of the court, otherwise the respondent will be entitled to have the appeal motion dismissed as an abandoned motion, although the notice of appeal was given in time: (*Re National Funds Assurance Company*, 35 L. T. Rep. N. S. 689; 4 Ch. Div. 305; 46 L. J. 183, Ch.; 25 W. R. 151, C. A.; and *Re Mansel*; *Rhodes v. Jenkins* (38 L. T. Rep. N. S. 403; 7 Ch. Div. 711; 47 L. J. Ch. 870; 26 W. R. 361, C. A.). But respondents will not be allowed to take advantage of a delay occasioned by themselves: (*Re Harker*; *Goodbarne v. Fothergill*, 40 L. T. Rep. N. S. 408; 10 Ch. Div. 613; 27 W. R. 587, C. A.)

For registrar's notice as to appeals from interlocutory orders in certain matters being set down for hearing in a separate list, see W. N. 1877, p. 88, part II.

The following "Notice to Solicitors" was issued on the 21st Nov. 1881, as to Papers for use of the Judges of the Court of Appeal.

"Papers for the Judges.

"The necessary papers for the use of the judges on the hearing of appeals must be left with Mr. Davey (the first officer of the Master of the Rolls), Lord Chancellor's private entrance, Lincoln's-inn, at least one week before the appeal is likely to appear in the daily court paper.

The papers required are :

Three copies of notice of appeal.

Three copies of order or judgment appealed from.

Three copies of pleading or other documents showing the nature of the appeal.

The above papers must be put together in three sets—that is to say, one complete set for each judge."

(W. N. 1881, p. 501, part II.)

In *Re Randall* (56 L. T. Rep. N. S. 8; W. N. 1887, p. 35), it was stated by the Court of Appeal that when there were three judges present, there should be three copies of each material document, and costs would be allowed.

9. The time for appealing from any order or decision made or given in the matter of the winding-up of a company under the provisions of the Companies Act, 1862, or any Act amending the same, or any order or decision made in the matter of any bankruptcy, or in any other matter not being an action, shall be the same as the time limited for appeal from an interlocutory order under rule 15. Time for appeal.

10. Where an *ex parte* application has been refused by the court below, an application for a similar purpose may be made to the Court of Appeal *ex parte* within four days from the date of such refusal, or within such enlarged time as a judge of the court below or of the Court of Appeal may allow. Ex parte applications

11. When any question of fact is involved in an appeal, the evidence taken in the court below bearing on such question shall, subject to any special order, be brought before the Court of Appeal as follows : Facts in appeal.

(a.) As to any evidence taken by affidavit, by the production of printed copies of such of the affidavits as have been printed, and office copies of such of them as have not been printed :

(b.) As to any evidence given orally, by the production of a copy of the judge's notes, or such other materials as the court may deem expedient.

Printing
evidence.

12. Where evidence has not been printed in the court below, the court below or a judge thereof, or the Court of Appeal or a judge thereof, may order the whole or any part thereof to be printed for the purpose of the appeal. Any party printing evidence for the purpose of an appeal without such order shall bear the costs thereof, unless the Court of Appeal or a judge thereof shall otherwise order.

Notes.

13. If, upon the hearing of an appeal, a question arise as to the ruling or direction of the judge to a jury or assessors, the court shall have regard to verified notes or other evidence, and to such other materials as the court may deem expedient.

Interlocutory
orders.

14. No interlocutory order or rule from which there has been no appeal shall operate so as to bar or prejudice the Court of Appeal from giving such decision upon the appeal as may be just.

Time within
which appeal
must be
brought.

15. No appeal to the Court of Appeal from any interlocutory order, or from any order, whether final or interlocutory, in any matter not being an action, shall, except by special leave of the Court of Appeal, be brought after the expiration of twenty-one days, and no other appeal shall, except by such leave, be brought after the expiration of one year. The said respective periods shall be calculated, in the case of an appeal from an order in chambers, from the time when such order was pronounced, or when the appellant first had notice thereof, and in all other cases, from the time at which the judgment or order is signed, entered, or otherwise perfected, or, in the case

of the refusal of an application, from the date of such refusal. Such deposit or other security for the costs to be occasioned by any appeal shall be made or given as may be directed under special circumstances by the Court of Appeal.

As to what orders are interlocutory and what are final, see *ante*, p. 148, and as to the time within which an appeal from an order on Originating Summons must be brought as a rule, see *ante*, p. 3.

15a. The time for appealing against an order made on the further consideration of a cause, and on the hearing of a summons to vary the certificate on which such order is made, shall be the same as the time for appealing against the order on further consideration.

The object of rule 15a, is to get rid of the anomaly of having two different periods of time for appealing where a summons to vary, and further consideration were heard together; (*Marsland v. Hole*, 40 Ch. Div. 110; 59 L. T. Rep. N. S. 593: 37 W. R. 81, C. A.)

16. An appeal shall not operate as a stay of execution or No stay. of proceedings under the decision appealed from, except so far as the Court appealed from, or any judge thereof, or the Court of Appeal, may order; and no intermediate act or proceeding shall be invalidated, except so far as the Court appealed from may direct.

17. Wherever under these rules an application may be Which court. made either to the court below or to the Court of Appeal, or to a judge of the court below or of the Court of Appeal, it shall be made in the first instance to the court or judge below.

18. Every application to a judge of the Court of By motion. Appeal shall be by motion, and the provisions of Order LII. shall apply thereto.

19. On an appeal from the High Court interest for Interest. such time as execution has been delayed by the appeal shall be allowed unless the court or a judge otherwise

orders, and the taxing officer may compute such interest without any order for that purpose.

PART III.

APPEALS TO THE HOUSE OF LORDS.

As already stated, an appeal lies from a decision of the Court of Appeal upon an Originating Summons in the same manner as if the action were commenced by writ. But as to "Time," see *ante*, p. 3.

Statute.

By sect. 4 of the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), "Every appeal shall be brought by way of petition to the House of Lords, praying that the matter of the order or judgment appealed against may be reviewed before Her Majesty the Queen in her Court of Parliament, in order that the said Court may determine what of right and according to the law and custom of this realm ought to be done in the subject-matter of such appeal."

Practice.

The practice on appeal to the House of Lords is fully set forth in the Standing Orders, which can be purchased for a very small sum of money; therefore it has not been thought necessary to encumber this work with them. Appendix III. *post*, contains forms of all the proceedings taken in an action commenced by an Originating Summons up to and including the order of the House of Lords, with some notes thereon, and it is believed that such forms, with a copy of the Standing Orders, will be a sufficient guide to the practice on this head.

CHAPTER XIII.

TIME.

ORDER LXIV. (a)

Time.

1. Where by these rules, or by any judgment or order Month. given or made after the commencement of the principal Act, time for doing any act or taking any proceeding is limited by months, and where the word "month" occurs in any document which is part of any legal procedure under these rules, such time shall be computed by calendar months, unless otherwise expressed.

2. Where any limited time less than six days from or Less than six days. after any date or event is appointed or allowed for doing any act or taking any proceeding, Sunday, Christmas Day, and Good Friday shall not be reckoned in the computation of such limited time.

3. Where the time for doing any act or taking any Sunday. proceeding expires on a Sunday, or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding shall, so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open.

4. No pleadings shall be amended or delivered in the Long Vacation, unless directed by a court or a judge. Long vacation.

(a) Orders LIX. to LXIII. relating respectively to "Divisional Courts," "Officers," "Central Office," "Registrars of the Chancery Division," and "Sittings and Vacations," and rules 9, 10, and 15 of this order relating to "Admiralty," are not sufficiently material to be inserted in the present work.

Time not
reckoned.

5. The time of the Long Vacation shall not be reckoned in the computation of the times appointed or allowed by these rules for filing, amending, or delivering any pleading, unless otherwise directed by the court or a judge.

6. The day on which an order for security for costs is served, and the time thenceforward until and including the day on which such security is given, shall not be reckoned in the computation of time allowed to plead, answer interrogatories, or take any other proceeding in the cause or matter.

Enlarging
time.

7. The court or a judge shall have power to enlarge or abridge the time appointed by these rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.

For full notes on this rule see Wilson and Annual Practice.

8. The time for delivering, amending, or filing any pleading, answer, or other document may be enlarged by consent in writing, without application to the court or a judge.

Service of
pleadings, &c.

11. Service of pleadings, notices, summonses, orders, rules, and other proceedings, shall be effected before the hour of six in the afternoon, except on Saturdays, when it shall be effected before the hour of two in the afternoon. Service effected after six in the afternoon on any weekday except Saturday shall, for the purpose of computing any period of time subsequent to such service, be deemed to have been effected on the following day. Service effected after two in the afternoon on Saturday shall for the like purpose be deemed to have been effected on the following Monday.

Exclusive and
inclusive.

12. In any case in which any particular number of

days, not expressed to be clear days, is prescribed by these Rules, the same shall be reckoned exclusively of the first day and inclusively of the last day.

13. In any cause or matter in which there has been no proceedings for one year from the last proceeding had, the party who desires to proceed shall give a month's notice to the other party of his intention to proceed. A summons on which no order has been made shall not, but notice of trial although countermanded shall be deemed a proceeding within this rule. No proceeding for a year

14. An application to set aside an award may be made at any time before the last day of the sittings next after such award has been made and published to the parties. Award.

CHAPTER XIV.

COSTS.

To deal exhaustively with the question of costs is beyond the scope of the present work. Therefore, only a few of the rules under Order LXV. bearing more immediately upon the subject in hand, with annotations thereon, are here given. For further information see Morgan and Wurtzburg on Costs, Dan., Seton, Wilson, and Annual Pract. And as to costs in administration actions, see Walker and Elgood.

ORDER LXV.

Costs.

Discretion of
court.

Trustees, &c.

1. Subject to the provisions of the Acts and these Rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge; provided that nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division: Provided also that, where any action, cause, matter, or issue is tried with a jury, the costs shall follow the event, unless the judge by whom such action, cause, matter, or issue is tried, or the court shall, for good cause, otherwise order.

It will be observed that an executor, administrator, trustee, or mortgagee may be deprived of his costs if he has acted unreasonably.

As to the costs of an unnecessary administration action, see Order LV., r. 10, *ante*, p. 93.

Solicitor and
client costs.

Except in a few special cases, a litigant is only entitled to costs as between party and party. The following are the principal

exceptions to that rule; (1) trustees, executors, and administrators are usually allowed their costs as between solicitor and client, including all charges and expenses properly incurred, out of the estate, see *Morgan and Wurtzburg*, p. 5; (2) in actions for administration or the like, if all parties are before the court, and *sui juris* and consent, costs are generally allowed as between solicitor and client; (3) in a creditor's action for administration, if the estate is insufficient to pay all the creditors in full, the plaintiff is entitled to costs as between solicitor and client, see *Morgan and Wurtzburg*, p. 202, and cases there cited; (4) the plaintiff in a legatee's administration action, when the estate is insufficient after payment of debts to pay the legacies in full, is entitled to his costs as between solicitor and client: (*Re Wilkins*; *Wilkins v. Rotherham*, 27 Ch. Div. 703; 33 W. R. 42); (5) the costs of an application to strike out from any endorsement or pleading unnecessary or scandalous matter, may be ordered to be paid as between solicitor and client: (see Order XIX., r. 257.) But the High Court has, in matters of equitable jurisdiction, a general and discretionary power to award costs as between solicitor and client to a successful party: (*Andrews v. Barnes*, W. N. 1888, p. 146; 58 L. T. Rep. N. S. 748. C. A.)

A question which frequently arises in administration actions (and the majority of applications by originating summons are connected with actions of that class) is, out of what fund the costs ought to be paid? The rule is, that the costs should be paid out of the general personal estate, that is in effect out of the residue: (see *Morgan and Wurtzburg*, pp. 165, 166.) If a testator bequeaths his residuary personal estate to several persons, one of whom predeceases him, and thereby his share lapses, the costs of a suit for the administration of the testator's estate would be payable out of the residue generally, and not primarily out of the lapsed share: (see *Trethewy v. Helyar*, 4 Ch. Div. 53; 46 L. J. 25, Ch.; and *Fenton v. Wills*, 3 L. T. Rep. N. S. 373; 7 Ch. Div. 33; 47 L. J. 191, Ch.; 26 W. R. 139; but, *contra*, *Gowan v. Broughton*, 31 L. T. Rep. N. S. 533; 19 Eq. 77; 44 L. J. 275, Ch.; 23 W. R. 332; and *Scott v. Cumberland*, 31 L. T. Rep. N. S. 26; 18 Eq. 578; 44 L. J. 228, Ch.; 22 W. R. 840.)

If the residuary personal estate is insufficient to pay the costs of an administration suit, the deficiency must be made up by the pecuniary legatees in priority to the residuary devisees: (*Tomkins v. Colthurst*, 33 L. T. Rep. N. S. 591; 1 Ch. Div. 626; 24 W. R. 267; and *Farquharson v. Floyer*, 35 L. T. Rep. N. S. 355; 3 Ch. Div. 109; 45 L. J. 750, Ch.)

If the residuary personalty, after payment of the debts, is insufficient to pay the costs of the suit, the deficiency must be borne by the specifically bequeathed personalty and specifically devised realty, Personalty insufficient.

Costs out of personal estate.

and the residuary realty rateably according to value: (*Johnson v. Pease*, 19 Eq. 96; *Maddison v. Pye*, 32 Beav. 658; but see observations of Malins, V. C. on that case in *Scott v. Cumberland*, *supra*; *Steud v. Hardaker*, 15 Eq. 175; 42 L. J. Ch. 317; 21 W. R. 258; *Hurst v. Hurst*, 28 Ch. Div. 159; 54 L. J. Ch. 190; 33 W. R. 473; *Re Price*; *Williams v. Jenkins*, 54 L. T. Rep. N. S. 416; 31 Ch. Div. 485; 55 L. J. 501, Ch.; 34 W. R. 291; *contra. Row v. Row*, 7 Eq. 414; and *Scott v. Cumberland*, *supra*.)

Real and
personal
estate.

In applications dealing with the real and personal estate of a testator, the rule in *Patching v. Barnett* (45 L. T. Rep. N. S. 292; 51 L. J. 74, Ch.) followed in *Re Middleton*; *Thompson v. Harris* (C. A.) (46 L. T. 359; 19 Ch. Div. 552; 51 L. J. 273, Ch.; 30 W. R. 293), must be borne in mind. In *Patching v. Barnett*, Jessel, M. R. presiding in the Court of Appeal said:

"I think it important to say that in the administration of the real and personal estate, the modern rule is that the costs exclusively occasioned by the administration of the real estate are thrown upon the real estate, so that the general costs of the suit are borne by the personal estate. What I will call 'the increased costs arising from administering the real estate,' are as a rule thrown upon the real estate, and the courts have been in the habit for several years past of apportioning those costs at the hearing instead of throwing upon the taxing master the very difficult task of ascertaining how much of each bill of costs made out by the solicitors has been occasioned exclusively by the real estate administration, and how much by the personal estate administration. That rule has been found to be very convenient, and to save great cost, great delay, and great difficulty in the taxing office. The judge, as a rule, knows more about the suit, and is better able to apportion the costs—to say nothing of his superior knowledge of law—than the taxing master, and it has been my habit for years past, whenever requested to do so, to apportion the costs, and to give some aliquot sum which is to the best of my judgment a fair proportion to be paid."

If a testator directs that his testamentary expenses are to be paid out of a particular fund, that fund will have to bear the costs of an action for administration in exoneration of the general estate: (see *Morgan and Wurtzburg*, p. 172; and *Miles v. Harrison*, 30 L. T. Rep. N. S. 190; 9 Ch. App. 316; 43 L. J. 585, Ch.; 22 W. R. 441.)

Testamentary
expenses.

"Testamentary expenses," include the costs of an administration suit (*Harloe v. Harloe*, 33 L. T. Rep. N. S. 247; 20 Eq. 471; 44 L. J. 512, Ch.; 23 W. R. 789; *Penny v. Penny*, 40 L. T. Rep. N. S. 393; 11 Ch. Div. 440; 48 L. J. 691, Ch.), but do not include costs of an action to administer the real estate: (see *Patching v. Barnett*, *supra*.)

The costs of determining questions of construction of a will fall on the whole residue, and not on the particular part of the estate with reference to which the question arises, therefore it may be advisable in some cases to delay distribution of the residue till the question of construction has been determined; but this delay might be avoided by setting apart a fund to meet the probable costs: (see *Re Giles*, p. 60, *ante*.)

When the estate is deficient, trustees and legal personal representatives are entitled to be paid their costs, charges, and expenses in priority to other parties: (*Dodds v. Tuke*, 50 L. T. Rep. N. S. 320; 25 Ch. Div. 617; 53 L. J. 598, Ch.; 32 W. R. 424; and *Turner v. Dancey*, 9 Beav. 339; and see *Batten v. Wedgwood Coal and Iron Company*, 52 L. T. Rep. N. S. 212; 28 Ch. Div. 317; 54 L. J. 686, Ch.; 33 W. R. 303.)

Although, as between an infant and his next friend, the latter will, as a rule, be allowed his costs as between solicitor and client, if the infant is only entitled in reversion, party and party costs only will be immediately paid, the next friend having liberty to apply for the difference between those costs and costs as between solicitor and client, when the fund comes into possession: (*Damant v. Hennell*, 55 L. T. Rep. N. S. 182; 33 Ch. Div. 224; 34 W. R. 774; *Re Burton*, W. N. 1887, p. 160; *Re Aldred*, W. N. 1888, p. 82.)

As to whether the costs should be taxed at once as between solicitor and client, or party and party, the last three cases are conflicting.

6. In any cause or matter in which security for costs is required, the security shall be of such amount, and be given at such times, and in such manner and form, as the court or a judge shall direct.

The ordinary cases in which security for costs may be required are—

(1.) Where the plaintiff or all the plaintiffs permanently reside abroad, as distinguished from being there on a visit: (*Republic of Costa Rica v. Erlanger*, 35 L. T. Rep. N. S. 19; 3 Ch. Div. 62; 45 L. J. 743, Ch.; 24 W. R. 955, C. A.). And such security may extend to past as well as future costs: (*Massey v. Allen*, 41 L. T. Rep. N. S. 788; 12 Ch. Div. 807; 48 L. J. 692, Ch.; 28 W. R. 243.) But apparently security will not be required if the plaintiff has substantial property in this country: (*Ebrard v. Gassier*, 52 L. T. Rep. N. S. 63; 28 Ch. Div. 232; 54 L. J. 441; 33 W. R. 287, C. A.) By the Judgments Extension Act, 1868 (31 & 32 Vict. c. 54), when a judgment has been obtained in England, a certificate of such judgment can be registered in the proper office in Scotland,

and the court in Scotland can issue process on such judgment. As the origin of the rule requiring security for costs was that, if a verdict were given against the plaintiff, he was not within the reach of our law so as to have process served upon him for costs, a plaintiff resident in Scotland or Ireland cannot be required to give security for costs: (*Raeburn v. Andrews*, 30 L. T. Rep. N. S. 15; L. Rep. 9 Q. B. 118; 43 L. J. 73, Q. B.; 22 W. R. 489; and Dan. p. 80, note (a); and Dan. F., p. 838, note (c). And see *Re Howe Machine Company*; *Fontaine's Claim*, 86 L. T. 390; 41 Ch. Div. 118, C.A.)

Limited
company.

2. Where a limited company is plaintiff or pursuer in any action, suit, or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by any credible testimony that there is reason to believe that, if the defendant be successful in his defence, the assets of the company will be insufficient to pay his costs, require sufficient security to be given for such costs, and may stay all proceedings until such security is given: (sect. 69 of the Companies Act, 1862.)

Insolvency.

3. Neither poverty nor even insolvency is a ground for requiring security for costs: (*Cowell v. Taylor*, 53 L. T. Rep. N. S. 483; 31 Ch. Div. 34; 55 L. J. 92, Ch.; 34 W. R. 24, C. A.; and *Rhodes v. Dawson*, 16 Q. B. Div. 548; 55 L. J. 134, Q. B.; 34 W. R. 241, C. A.)

But if owing to bankruptcy proceedings the plaintiff is not the real plaintiff, but is a person whose name is used by some one behind him, apparently security for costs may be ordered: (*Malcolm v. Hodgkinson*, L. Rep. 8 Q. B. 209; 21 W. R. 360; and see *Brocklebank and Company v. The King's Lynn Steamship Company* (38 L. T. Rep. N. S. 489; 3 C. P. Div. 365; 47 L. J. 321, C. P.; 27 W. R. 94; and *Re Carta Para Mining Company*, 19 Ch. Div. 457; 30 W. R. 117; and the comments on those cases in *Rhodes v. Dawson*, *supra*.) For other cases in which security for costs may be ordered, see *Morgan and Wurtzburg*, p. 7, *et seq.*; *Wilson*, 479; and *Annual Pract.*

It will be observed that the amount of security is in the discretion of the court: (see *Republic of Costa Rica v. Erlanger*, *supra*.)

Ordinarily
resident
abroad.

6a. A plaintiff ordinarily resident out of the jurisdiction may be ordered to give security for costs, though he may be temporarily resident within the jurisdiction.

This rule was added by R. S. C., Dec., 1885.

Bond.

7. Where a bond is to be given as security for costs, it shall, unless the court or a judge shall otherwise

direct, be given to the party or person requiring the security, and not to an officer of the court.

8. In causes and matters commenced after these rules Lower scale. come into operation, solicitors shall be entitled to charge and be allowed the fees set forth in the column headed "lower scale" in Appendix N.* in all causes and matters, and no higher fees shall be allowed in any case, except such as are by this Order otherwise provided for; and in causes and matters pending at the time when these rules come into operation, to which the higher scale of costs previously in force was applicable, the same scale shall continue to be applied.

9. The fees set forth in the column headed "higher Higher scale. scale" in Appendix N.* may be allowed, either generally in any cause or matter, or as to the costs of any particular application made, or business done, in any cause or matter, if, on special grounds arising out of the nature and importance, or the difficulty or urgency of the case, the court or a judge shall, at the trial or hearing, or further consideration of the cause or matter, or at the hearing of any application therein, whether the cause or matter shall or shall not be brought to trial or hearing or to further consideration (as the case may be), so order; or if the taxing officer, under directions given to him for that purpose by the court or a judge, shall think that such allowance ought to be so made upon such special grounds as aforesaid.

The cases in which costs are allowed on the higher scale are rare. For an instance of such costs being allowed on an Originating Summons, see *Re Chaytor's Settled Estate Act* (50 L. T. Rep. N. S. 88; 25 Ch. Div. 651; 53 L. J. 312, Ch.; 32 W. R. 517).

Costs on the higher scale were also granted in the following actions:—*Holland v. Worley* (50 L. T. Rep. N. S. 526; 26 Ch. Div. 578); *Lydney Wigpool Iron Ore Company v. Bird* (54 L. T. Rep. N. S. 242, 245; 31 Ch. Div. 328, 340; 55 L. J. 383, Ch.; 34 W. R. 437); *Davies v. Davies* (56 L. T. Rep. Rep. N. S. 401, 406; 36 Ch. Div. 359; 56 L. J. 481, Ch.; 35 W. R. 697, only subsequent to

reply); *Moseley v. The Victoria Rubber Company* (57 L. T. Rep. N. S. 142, 148).

Leave was given to the taxing master to tax on higher scale if he thought fit in:—*Fraser v. Brescia Steam Tramways Company* (56 L. T. Rep. N. S. 771).

They were *refused* in the following actions:—*Williamson v. North Staffordshire Railway* (55 L. T. Rep. N. S. 452; 32 Ch. Div. 399; 55 L. J. 938, Ch. C. A.); *Hudson v. Osgerby* (50 L. T. Rep. N. S. 323; 32 W. R. 566; W. N. 1884, p. 83); *Grafton v. Weston* (51 L. T. Rep. N. S. 141, 144); *The Cardiff Steamship Company v. John Barwick* (53 L. T. Rep. N. S. 56, 59); *Horner v. Whitechapel Board of Works* (54 L. J. 151, Ch.); *The Horace* (50 L. T. Rep. N. S. 595; 9 P. Div. 86; 53 L. J. 323, P.; 32 W. R. 755); and on petition in *Re Spettigue's Trusts* (W. N. 1884, p. 6; 32 W. R. 385).

Higher scale
on special
grounds.

10. Upon any reference to a taxing officer to tax a bill of costs of a solicitor for the purpose of ascertaining the amount due to such solicitor in respect thereof from the person to be charged therewith, if such bill shall include charges for business done in any cause or matter, the taxing officer may allow the fees set forth in the column headed "higher scale" in Appendix N.* in respect of such cause or matter, or in respect of any particular application made or business done therein, if on such special grounds, as are in the last preceding rule mentioned, he shall think that such allowance ought to be so made.

Solicitor
liable to pay
costs personally.

11. If in any case it shall appear to the court or a judge that costs have been improperly or without any reasonable cause incurred, or that by reason of any undue delay in proceeding under any judgment or order, or of any misconduct or default of the solicitor, any costs properly incurred have nevertheless proved fruitless to the person incurring the same, the court or judge may call on the solicitor of the person by whom such costs have been so incurred to show cause why such costs should not be disallowed as between the solicitor and his client, and also (if the circumstances of the case

shall require) why the solicitor should not repay to his client any costs which the client may have been ordered to pay to any other person, and thereupon may make such order as the justice of the case may require. The court or judge may, if they or he think fit, refer the matter to a taxing officer for inquiry and report; and direct the solicitor in the first place to show cause before such taxing officer, and may also, if they or he think fit, direct or authorise the official solicitor of the Supreme Court to attend and take part in such inquiry. Such notice (if any) of the proceedings or order shall be given to the client in such manner as the court or judge may direct. Any costs of the official solicitor shall be paid by such parties, or out of such funds as the court or a judge may direct; or, if not otherwise paid, may be paid out of such moneys (if any) as may be provided by Parliament.

See *Brown v. Burdett* (58 L. T. Rep. N. S. 571; 37 Ch. Div. 207, C. A.) as to the wide scope of this rule, and *Re Ormston Goldring v. Lancaster* (58 L. T. Rep. N. S. 74; 36 W. R. 216, and W. N. 1887, p. 251; *Ib.* 1888, p. 152; 85 L. T. 155, C. A.) as to costs of useless inquiries.

See also *Brown v. Burdett* (No. 2) (60 L. T. Rep. N. S. 520; 40 Ch. Div. 244, C. A.) as to costs allowed by taxing master as between a solicitor and his client not being conclusive of the amount which court will allow out of estate.

13. Where the court or a judge appoints one of the solicitors of the court to be guardian *ad litem* of an infant or person of unsound mind, the court or judge may direct that the costs to be incurred in the performance of the duties of such office shall be borne and paid either by the parties or some one or more of the parties to the cause or matter in which such appointment is made, or out of any fund in court in which such infant or person of unsound mind may be interested, and may give directions for the repayment or allowance of such

costs as the justice and circumstances of the case may require.

Reference to
taxation.

18. Every reference for the taxation of costs in the Chancery Division shall be made to the taxing master in rotation ; [or in such manner or order as the Lord Chancellor may from time to time direct] provided that in any case where there shall have been any former taxation in the same cause or matter, or in any summons under Order LV., rr. 3 or 4, relating to the same estate or trust, the reference shall be to the taxing master before whom such former taxation took place.

The words in brackets were added by R. S. C. May, 1889. For these rules see W. N. May 11, 1889, p. 231.

For Order LV., r. 3, see p. 79, and r. 4, p. 85, *ante*.

Taxing
masters.

19. The taxing masters shall be respectively assistant to each other, and in the discharge of their duties ; and, for the better despatch of the business of their respective offices, any taxing master may tax or assist in the taxation of a bill of costs which has been referred to any other taxing master for taxation, and for ascertaining what is due in respect of such costs, and in such case shall certify accordingly.

19a. The following warrants in the office of the taxing masters of the Chancery Division shall be abolished : Warrant on leaving, warrant to bring in, and warrant to tax.

This rule was added by R.S.C., Dec. 1885.

19b. The proper officer, by whom any order directing a taxation of costs shall be drawn up, shall certify upon the order the date on which it was signed, entered, or otherwise perfected.

19c. Should the solicitor having the carriage of the order fail in leaving at the office of the proper taxing master within seven days after the order was signed, entered, or otherwise perfected, a copy of it, and

(annexed to such copy) a statement containing the names and addresses of the parties appearing in person and of the solicitors of the parties not appearing in person, no costs of taxation shall be allowed to the solicitor so failing.

19*d*. On the copy of the order being left with the taxing master he shall forthwith send by post to the parties appearing in person, and to the solicitors of the parties not appearing in person a notice fixing a date before which the bills, the taxation whereof is directed by the order shall (with all necessary papers and vouchers) be left for taxation, and a subsequent date on which the taxation shall be proceeded with.

Rules 19*b*, 19*c*, and 19*d* were added by R. S. C., May, 1889, in substitution for former rules 19*b*, 19*c*, and 19*d* annulled.

19*e*. The taxation shall, if possible, be continued without interruption till completed; but if adjourned for any reason, notice of the adjournment shall be sent by the taxing master by post to any solicitor not present at the time of the adjournment whose attendance he may desire at the next appointment. Adjournment
of taxation.

19*g*. Any solicitor who shall fail to leave his bill of costs (with the necessary papers and vouchers) within the time or extended time fixed by the taxing master for that purpose, or who shall in any way delay or impede the taxation shall, unless the taxing master otherwise directs, forfeit the fees to which he would otherwise be entitled for drawing his bill of costs, and for attending the taxation, and the taxing master may also, if he shall think fit, exercise all or any of the powers vested in him by regulations (28) and (55) of this Order. Penalty for
delay in
taxation.

19*h*. In every bill of costs the professional charges shall be entered in a separate column from the disbursements, and every column shall be cast before the bill is left for taxation.

Rules 19*e*, 19*g*, and 19*h* were added by R. S. C. Dec. 1885.

Costs of
evidence.

27. (9.) As to evidence, such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence, and the attendance of witnesses, are to be allowed.

As to evidence on applications by Originating Summons generally see *ante*, p. 27.

It is important that all affidavits filed should be entered as read in the order, otherwise the costs of them will not be allowed on taxation even as between solicitor and client: (see *Stephens v. Lord Newborough*, 11 Beav. 403; Morgan's Acts and Orders, p. 549.

Advice of
counsel.

27. (15.) Such costs of procuring the advice of counsel on the pleadings, evidence, and proceedings in any cause or matter as the taxing officer shall in his discretion think just and reasonable, and of procuring counsel to settle such pleadings and special affidavits as the taxing officer shall in his discretion think proper to be settled by counsel, are to be allowed; but as to affidavits a separate fee is not to be allowed for each affidavit, but one fee for all the affidavits proper to be so settled, which are or ought to be filed at the same time.

"Pleading" includes an originating summons. Therefore, the taxing master has full discretion to allow the cost of procuring counsel to settle such a summons, and it is believed that such cost is usually allowed.

Counsel in
chambers.

27. (16.) As to counsel attending at judges' chambers, no costs thereof shall in any case be allowed, unless the judge certifies it to be a proper case for counsel to attend.

But see Order LV., r. 1a, *ante*, p. 53. It is not the practice in the Chancery Division for counsel attending upon the judge in chambers to apply for a certificate under this rule. It is believed that the cost of counsel attending before the judge in chambers in this division upon an Originating Summons is allowed as a matter of course.

Costs out of
a fund.

27A. (38a.) If in any case in which a taxation is directed with a view to the payment of the costs out of a fund or estate (real or personal), or out of the assets

of a company in liquidation, the costs shall have been increased by unnecessary delay, or by improper, vexatious, or unnecessary proceedings, or by other misconduct or negligence, or if from any other cause the amount of the costs shall, in the opinion of the taxing master, be excessive having regard to the value of the fund, estate, or assets to which they relate, or other circumstances, the taxing master shall allow only such an amount of costs as would, in his opinion, have been incurred if the litigation had been properly conducted, and shall assess the same at a gross sum, and shall (if necessary) apportion the amount among the parties.

(b.) If on the taxation of a bill of costs payable out of a fund or estate (real or personal), or out of the assets of a company in liquidation, the amount of the professional charges (exclusive of disbursements) contained in the bill is reduced by a sixth part, no costs shall be allowed to the solicitor leaving the bill for taxation for drawing and copying it, nor for attending the taxation.

This rule was added by R. S. C., May, 1889.

CHAPTER XV.

SERVICE OF ORDERS, &c.

ORDER LXVII., R. S. C., 1883.

*I. Service of Orders, &c.*Showing
original.

1. Except in the case of an order for attachment, it shall not be necessary to the regular service of an order that the original order be shown if an office copy of it be exhibited.

Service not
personal.

2. All writs, notices, pleadings, orders, summonses, warrants, and other documents, proceedings, and written communications in respect of which personal service is not requisite, shall be sufficiently served if left within the prescribed hours, at the address for service of the person to be served as defined by Orders IV. and XII., with any person resident at or belonging to such place.

By post.

3. Notices sent from any office of the Supreme Court may be sent by post; and the time at which the notice so posted would be delivered in the ordinary course of post shall be considered as the time of service thereof, and the posting thereof shall be a sufficient service.

If no appear-
ance.

4. Where no appearance has been entered for a party, or where a party or his solicitor, as the case may be, has omitted to give an address for service as required by Orders IV. and XII., all writs, notices, pleadings, orders, summonses, warrants, and other documents, proceedings, and written communications in respect of which personal service is not requisite may be served by filing them with the proper officer.

Personal
service.

5. Where personal service of any writ, notice, pleading, order, summons, warrant, or other document, proceeding, or written communication is required by these

rules or otherwise, the service shall be effected as nearly as may be in the manner prescribed for the personal service of a writ of summons.

6. Where personal service of any writ, notice, pleading, summons, order, warrant, or other document, proceeding, or written communication is required by these rules or otherwise, and it is made to appear to the court or a judge that prompt personal service cannot be effected, the court or judge may make such order for substituted or other service, or for the substitution of notice for service by letter, public advertisement, or otherwise, as may be just. Substituted service.

As to service of an Originating Summons, see *ante*, pp. 49, 87, *et seq.*

7. Where a party after having sued or appeared in person has given notice in writing to the opposite party or his solicitor, through a solicitor, that such solicitor is authorised to act in the cause or matter on his behalf, all writs, notices, pleadings, summonses, orders, warrants, and other documents, proceedings, and written communications which ought to be delivered to or served upon the party on whose behalf the notice is given shall thereafter be delivered to or served upon such solicitor. Service on solicitor.

8. Where a person who is not a party appears in any proceeding either before the court or in chambers, service upon the solicitor in London by whom such person appears, whether such solicitor act as principal or agent, shall be deemed good service except in matters requiring personal service.

9. Affidavits of service shall state when, where, and how and by whom, such service was effected. Affidavit of service.

[The remaining rules of this order relate to Admiralty actions.]

PART II.

STATUTES

(OTHER THAN THOSE REFERRED TO IN ORDER LV.,
R. 2, *ante*, p. 54, *et seq.*)

UNDER WHICH

AN ORIGINATING SUMMONS MAY BE ISSUED.

CHAPTER XVI.

VENDOR AND PURCHASER ACT, 1874, SECT. 9.

(37 & 38 VICT. c. 78.)—7TH AUGUST, 1874.

9. A vendor or purchaser of real or leasehold estate in England, or their representatives respectively, may at any time or times, and from time to time, apply in a summary way to a judge of the Court of Chancery in England in chambers, in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract (not being a question affecting the existence or validity of the contract), and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all, or any, of the costs of and incident to the application shall be borne and paid.

A vendor or purchaser of real or leasehold estate in Ireland, or their representatives respectively, may, in like manner, and for the same purpose, apply to a judge of the Court of Chancery in Ireland, and the judge shall make such order upon the application as to him shall

appear just, and shall order how and by whom all, or any, of the costs of and incident to the application shall be borne and paid.

Applications under this section are by Originating Summons.

For form of summons see Appendix III., *post*, and Dan. F. 1525.

The above section, which enables difficulties in purchases, and disputes between vendors and purchasers, to be decided on summons, has proved extremely useful. It authorises the vendor or purchaser of real or leasehold estate in England, or their representatives, to apply in chambers to a judge of the Chancery Division in respect of (1) any requisitions or objections, or (2) any claim for compensation, or (3) any other question arising out of or connected with the contract (not being a question affecting the existence or validity of the contract).

It will be convenient to deal with the subject under different heads.

(1.) *When the Procedure by Summons under this Section Applies.*

The section only applies to purchases properly so called; but the validity of a voluntary grant can be tested by means of an application under this section, if a nominal consideration is inserted: *Re Marquis of Salisbury*, 34 L. T. Rep. N. S. 5; 23 W. R. 824.)

The section is not intended to apply to cases where there are questions of controverted facts: (see *Re Popple and Barratt's Contract*, 25 W. R. 248; and *Re Burroughs Lynn and Sexton*, 36 L. T. Rep. N. S. 778; 5 Ch. Div. 601; 46 L. J. 528, Ch.; 25 W. R. 520), where the Master of the Rolls had refused to hear evidence on affidavit, filed since the summons and the cross-examination of the deponents. The Court of Appeal declared such evidence admissible, and Lord Justice James, with the concurrence of the other members of the court, laid it down "that whatever could be done in chambers upon reference as to title, under a decree where title was established, could be done upon proceedings under this Act."

In *Re Gray v. The Metropolitan Railway Company*, 44 L. T. Rep. N. S. 567) Mr. Justice Fry doubted his power in an application under this section to try a preliminary issue of fact.

It is the practice in the chambers of Mr. Justice Chitty to require an agreed statement of facts to be brought in: (see Dan. F., p. 654, note x.) For form of such statement see Appendix III., *post*. But the facts may be proved by affidavit: (see Dan. F., p. 655, note x, and *Re Johnson and Tustin*, 53 L. T. Rep. N. S. 845; 30 Ch. Div. 42; 54 L. J. 43, Ch.; 33 W. R. 43.)

Although questions as to the "existence or validity of the contract" cannot be tried on this summons, questions as to the right to rescind were tried in *Jackson and Oakshott* (14 Ch. Div. 851; 41 L. T. Rep. N. S. 719; 49 L. J. 523, Ch.; 28 W. R. 794); *Dames to Wood* (53 L. T. Rep. N. S. 177; 29 Ch. Div. 626; 54 L. J. 771, Ch.; 33 W. R. 685; 49 J. P. 52; affirming 51 L. T. Rep. N. S. 109; 27 Ch. Div. 172); *Glenton and Saunders to Haden* (53 L. T. Rep. N. S. 434; 50 J. P. 118); *Monckton to Gilzean* (51 L. T. Rep. N. S. 320; 27 Ch. Div. 555; 54 L. J. 257, Ch.; 33 W. R. 973); and *The 163rd Starr Bowkett B. B. S. and Sibun's Contract* (W. N. 1889, p. 97; 87 L. T. 31).

The Court can determine the validity of a notice given by the vendor to rescind the contract of sale: (*Re Jackson and Woodburn's*, 37 Ch. Div. 44; 57 L. T. Rep. N. S. 753; 57 L. J. 243, Ch.; 36 W. R. 396.)

It has been held that if a contract is void in consequence of fraudulent or negligent misrepresentation the procedure under this section is unsuitable: (*Re Davis and Cavey's Contract*, 60 L. T. Rep. N. S. 100; 40 Ch. Div. 601, 609; 58 L. J. 143, Ch.)

The reported cases which have been decided under this section are very numerous, so only a few of them are given here. As a rule they have arisen with respect to some objection or requisition on title.

Questions of compensation were decided in *Re Turner and Skelton* (41 L. T. Rep. N. S. 668; 13 Ch. Div. 130), and in *Re Orange and Wright's Contract* (52 L. T. Rep. N. S. 606). As to the power of a person to convey, in *Re Waddell's Contract* (2 Ch. Div. 172). As to a purchaser's right to the statutory acknowledgment of right to production of deeds, in *Re Agg-Gardner* (49 L. T. Rep. N. S. 804; 25 Ch. Div. 600; 53 L. J. 347, Ch.; 32 W. R. 356). Whether a vendor had a right to interest on a deposit in a bank, in *Gold and Norton's Contract* (52 L. T. Rep. N. S. 321; 33 W. R. 333; W. N. 1885, p. 6). As to the personal attendance of trustees to receive purchase money, in *Re Flower and Metropolitan Board of Works (a)* (51 L. T. Rep. N. S. 257; 27 Ch. Div. 592; 53 L. J. 955, Ch.; 32 W. R. 1101). As to covenants by a tenant for life, in *Re Sawyer and Baring's Contract* (51 L. T. Rep. N. S. 356). As to succession duty, in *Re Cooper and Allen's Contract* (35 L. T. Rep. N. S. 890; 4 Ch. Div. 802; 46 L. J., N. S. 133, Ch.; 25 W. R. 301).

For a selection of cases alphabetically arranged see Clarke and Humphrey on Sales of Land, p. 486, *et seq.*, and see Dan. 1382, *et seq.*

(a) The doctrine of this case is now modified by the Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 2 (1).

(2.) *Nature of Relief Obtainable on Summons.*

In exercising the summary jurisdiction given by this section, the court has power not only to answer the question submitted to it, but to direct such things to be done as are the natural consequence of the decision, see *Re Hargreaves and Thompson's Contract* (55 L. T. Rep. N. S. 239; 32 Ch. Div. 454; 56 L. J. 199, Ch.; 34 W. R. 708, C.A.). Thus the Court has power to award to a purchaser a return of his deposit with interest (*Smith and Stott*, 48 L. T. Rep. N. S. 512; 29 Ch. Div. 1009, n.; 31 W. R. 411), and costs of purchaser's investigation of title: (*Re Yielding and Westbrook*, 54 L. T. Rep. N. S. 531; 31 Ch. Div. 344; 55 L. J. 496, Ch.; 34 W. R. 397; *Hargreave and Thompson's Contract*, *supra*; *Re Higgins and Percival*, 59 L. T. Rep. N. S. 213; 57 L. J. 807, Ch.; W. N. 1888, p. 172.) But in *Re Davis and Cavey's Contract* (see p. 174 above), under special circumstances the court refused to order return of deposit. It is doubtful whether the court has jurisdiction, on a vendor and purchaser summons, to order return to a purchaser of interest erroneously paid by him: but when the vendor waived the objection the court ordered payment of such interest to the purchaser: (*Re Young and Harston's Contract*, 53 L. T. Rep. N. S. 837; 31 Ch. Div. 168; 34 W. R. 84; 50 J. P. 245, C.A.)

Judgment will be given in court if the purchaser desires it (*Coleman v. Jarrom*, 35 L. T. Rep. N. S. 614; 4 Ch Div. 165; 25 W. R. 137) or the judge thinks fit. If the vendor does not comply with the order made, the purchaser should apply in chambers for its enforcement—not bring an action for specific performance: (*Thompson to Ringer*, 44 L. T. Rep. N. S. 507; 29 W. R. 520.)

On a decision as to succession duty the Crown was held not bound, as not being before the court: (*Cooper and Allen's Contract*, 35 L. T. Rep. N. S. 890; 4 Ch. Div. 802, 805; 46 L. J. 133, Ch.; 25 W. R. 301.)

A reference to chambers may be made to ascertain amount of compensation to which a purchaser is entitled under a condition, (*Aspinall to Powell and Scholefield*, 60 L. T. Rep. N. S. 595; 87 L. T. 37, 51.)

On a vendor's summons a purchaser can obtain rescission: (*Re Higgins and Percival*, 59 L. T. Rep. N. S. 213; 57 L. J. 807, Ch.; W. N. 1888, p. 172.)

In *Re Thackwray and Young's Contract* (59 L. T. Rep. N. S. 815; 40 Ch. Div. 34; 58 L. J. N. S. 72, Ch.; 37 W. R. 74) Mr. Justice Chitty refused to hold that a purchaser was forced to take a doubtful title without deciding that the title was bad, although the point depended on the construction of an Act of Parliament.

(3.) *Costs.*

The general (but not universal) rule as to the costs of the summons is that the losing party, whether vendor or purchaser, is ordered to pay them: (*Re Packman and Moss*, 1 Ch. Div. 214; *Osborne to Rowlett*, 42 L. T. Rep. N. S. 650; 13 Ch. Div. 224, 298; 49 L. J. 310, Ch.; 28 W. R. 365; and *Re Johnson and Tustin*, 53 L. T. Rep. N. S. 281; 30 Ch. Div. 42; 54 L. J. 43, Ch.; 33 W. R. 43) where the Court of Appeal gave the purchaser (a successful appellant) his costs of appeal and below.

In case of objection to title the court will not, where it decides in favour of the title, make the vendor pay costs simply on the ground that it was not such that a conveyancer would accept without the decision of the court; on the contrary the general rule is to order the purchaser to pay the costs so as to assure his title, and show that the court entertains no doubt upon it (*Osborne v. Rowlett, supra*), but as in that case the difficulty arose entirely from conflicting decisions, Sir G. Jessel made no order for costs, though declaring that this was not because he had any doubt as to the title. In *Finch v. Jukes* (W. N. 1877, Aug. 11, p. 211), Vice-Chancellor Hall, in deciding on an objection in favour of the vendor, said it was a proper case to be brought into court, and left each party to bear their own costs.

In *Re Coward and Adams' Purchase* (32 L. T. Rep. N. S. 682; L. Rep. 20 Eq. 179; 44 L. J. 384, Ch.; 23 W. R. 605), Sir G. Jessel said that "if the unsuccessful party were made to pay the costs of the summons, it would go far to interfere with the beneficial operation of the Act, and he should therefore direct each party to pay his own costs." This was a case of a requisition which the court declared "satisfied."

Where a solicitor had inserted an inaccurate statement in particulars, and had endeavoured to cover it by a condition, and it was held that purchase could not be compelled to complete, the solicitor's costs against the vendor were disallowed on taxation: (*Re X.*, 54 L. T. Rep. N. S. 634.) For further cases see Clarke and Humphrey on Sales of Land, p. 489.

In *Re Edwards and Rudkin to Green* (58 L. T. Rep. N. S. 789, 792) no costs of summons were given on either side.

(4.) *Appeal.*

As to appeals from chambers, see *ante*, p. 143 *et seq.*

Under Order LVIII, r. 9, of the Rules of 1875, it was held that an appeal from a vendor and purchaser summons must be within twenty-one days (*Re Blyth and Young*, 41 L. T. Rep. N. S. 746; 13 Ch. Div. 416; 28 W. R. 266); and as a summons under the Vendor and Purchaser Act, 1874, is not taken out under Order LV.,

r. 3, it may be that such an appeal must still be brought within twenty-one days, notwithstanding : (*Re Fawsitt; Galland v. Burton*, 53 L. T. Rep. N. S. 271 ; 30 Ch. Div. 231) *ante*, p. 3.

As to appeals from orders made in court, see *ante*, p. 146, *et seq.*

(5.) *Miscellaneous.*

The party taking out the summons must bring the matter properly before the court : (*Re Parker and Beech's Contract*, 56 L. T. Rep. N. S. 95 ; W. N. 1887, p. 27).

In *Re Tippetts and Newbould's Contract*, (58 L. T. Rep. N. S. 754 ; 37 Ch. Div. 444 ; 36 W. R. 597) it was held that a vendor and purchaser summons might be amended so as to make it an Originating Summons under Order LV. r. 3.

“On a summons under the Vendor and Purchaser Act the only persons between whom the court can decide anything are the vendor and purchaser” ; but other persons can come in and agree to be bound, and can concur in the summons and can appeal : (*Re Naylor and Spendla's Contract*, 56 L. T. Rep. N. S. 132 ; 34 Ch. Div. 217, 220, C.A.).

When the relief sought can be obtained on a summons under this Act, *semble*, that if the plaintiff brings an action he will only be entitled to the costs of a summons : (*King v. Chamberlayn*, W. N. 1887, p. 158.)

CHAPTER XVII.

THE CONVEYANCING AND LAW OF PROPERTY
ACT, 1881 (SECTS. 5, 9, 39, AND 42).

(44 & 45 VICT. c. 41.)

22nd Aug., 1881. (a)

SECTION 5.

Discharge of Incumbrances on Sale.

5. (1.) Where land subject to any incumbrance, whether immediately payable or not, is sold by the court, or out of court, the court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into court, in case of an annual sum charged on the land, or of a capital sum charged on a determinable interest in the land of such amount as, when invested in Government securities, the court considers will be sufficient, by means of the dividends thereof, to keep down or otherwise provide for that charge, and in any other case of capital money charged on the land, of the amount sufficient to meet the incumbrance and any interest due thereon; but in either case there shall also be paid into court such additional amount as the court considers will be sufficient to meet the contingency of further costs, expenses, and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the court, for special reason, thinks fit to require a larger additional amount.

(2.) Thereupon, the court may, if it thinks fit, and either after or without any notice to the incumbrancer, as the court thinks fit, declare the land to be freed from

(a) This Act commences immediately after the 31st December, 1881.

the incumbrance, and make any order for conveyance or vesting order proper for giving effect to the sale, and give directions for the retention and investment of the money in court.

(3.) After notice served on the persons interested in or entitled to the money or fund in court, the court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

(4.) This section applies to sales not completed at the commencement of this Act, and to sales thereafter made.

Applications under this section are by Originating Summons unless made in a pending action or matter, see Dan. F., p. 996, note n., and sect. 69, sub-sect. 3 of the Act, which is as follows:

“Every application to the court shall, except where it is otherwise expressed, be by summons at chambers.”

For forms of summons, see Dan. F. 2249 and 2250.

The above is a very useful provision, particularly when annuities are charged on the land.

Where real estate, forming part of an estate which is being administered by the court, is charged with an annuity, upon further consideration the court will not, under the Conveyancing Act, 1881, sect. 5, direct the property to be sold free from the annuity, but will direct an application in chambers as to the mode of sale: (*Patching v. Bull*, 46 L. T. Rep. N. S. 227; 30 W. R. 244.)

The court will not, under the power given to it in this section, compel a vendor of land to pay money into court for discharging an incumbrance on the land when the result would be to inflict a great hardship upon him; *e.g.*, where the incumbrance is a perpetual rentcharge and the sum necessary for its discharge much exceeds the purchase money payable to the vendor.

A railway company who had acquired land, under the L. C. C. Act, for a perpetual rentcharge of 63*l.*, agreed to sell it, unincumbered, for 868*l.*, overlooking the rentcharge. The contract contained power to rescind if purchaser declined to waive any valid objection to title. The company offered to indemnify against the rentcharge, but refused to redeem. Held, that the company was not bound to apply to the court to redeem under this section, but could rescind. *Quære*, whether the section applies to unwilling vendors. Words “direct” and “allow” in sub-sect. (1) explained:

(*Re Great Northern Railway and Sanderson*, 50 L. T. Rep. N. S. 87; 25 Ch. Div. 788.)

It will be seen from the above cases, that the exercise of this power by the court is discretionary; and an opinion is expressed in Dart. V. & P. that "this section is probably intended to apply only in exceptional cases, as where an incumbrancer cannot concur in the ordinary way:" (6th edit. 176; see also *Ib.* p. 667, n.)

A mortgage deed gave the mortgagee an option to purchase in case the debt was not paid on a day named. The trustees in bankruptcy of the mortgagors sold the mortgaged property. A part of the purchase money was deposited to provide against the mortgage. Pending proceedings on the part of the trustees to set aside the mortgage on the ground of fraudulent preference, an order was made that the money deposited should be paid into court, and on such further sum being paid in as would cover the principal and interest due, and 10 per cent. extra, the mortgaged property should vest in the purchaser: (*Milford Haven Railway and Estate Company v. Mowatt*; *Re Lake and Taylor's Mortgage*, 28 Ch. Div. 402.)

An order by the court, under the Conveyancing Act, 1881, s. 5, for the sale of land free from an incumbrance, the incumbrancer not being party to the action, should follow the words of the statute, and after directing payment into court of the purchase money, and setting aside of an amount sufficient to meet the incumbrance, &c., should declare that thereupon any party should be at liberty to apply in chambers for a declaration that the land is freed from the incumbrance: (*Dickin v. Dickin*, 73 L. T. 179; 30 W. R. 887.)

For valuable dissertations on this section, see Wolstenholme and Turner's Conveyancing Acts, 4th edit., p. 27, *et seq.*, and Clerke and Brett.

As to practice, see Dan. pp. 1101, 2312.

SECTION 9.

Production and Safe Custody of Title Deeds.

Under this section (sub-sects. 1-6) where a person retains possession of documents and gives to another a written acknowledgment of the latter's right to production and delivery of copies thereof, such acknowledgment binds the holders of the documents for the time being at the written request and costs of the person entitled to the benefit of the acknowledgment to produce the documents and deliver copies thereof, but does not confer any right to damages for loss of the documents.

Sub-sect. 7 is as follows:

"Any person claiming to be entitled to the benefit of

an acknowledgment may apply to the court for an order directing the production of the documents to which it relates, or any of them, or the delivery of copies of, or extracts from those documents, or any of them, to him, or some person on his behalf; and the court may if it thinks fit order production, or production and delivery accordingly, and may give directions respecting the time, place, terms, and mode of production or delivery, and may make such order as it thinks fit respecting the costs of the application, or any other matter connected with the application."

Under sub-sect. 9, where a person retains possession of documents and gives to another a written undertaking for safe custody thereof that binds the holder of the documents for the time being to keep them safe, unless prevented by fire or inevitable accident.

Sub-sect. 10 is as follows:

"Any person claiming to be entitled to the benefit of such an undertaking may apply to the court to assess damages for any loss, destruction of, or injury to the documents, or any of them, and the court may, if it thinks fit, direct an inquiry respecting the amount of damages, and order payment thereof by the person liable; and may make such order as it thinks fit respecting the costs of the application, or any other matter connected with the application."

This section applies only to an acknowledgment or undertaking given, or a liability respecting documents incurred after the commencement of the Act: (sub-sect. 14.)

Applications under sub-sect. 7 and 10 of this section are by Originating Summons.

For forms of summons, see Dan. F. 2251, 2252.

SECTION 39.

Married Women.

(1.) Notwithstanding that a married woman is restrained from anticipation, the court may, if it thinks fit, where it appears to the court to be for her benefit,

by judgment or order, with her consent, bind her interest in any property.

(2.) This section applies only to judgments or orders made after the commencement of this Act.

Applications under this section are by Originating Summons unless made in a pending action or matter, see *Dan. F.*, p. 998, note (z), and sect. 69, sub-sect. 3, of the Act, and *Re Lillwall's Settlement Trusts*, 30 W. R. 243, and W. N., 1882, p. 6.

It is not necessary that the married woman's consent should be obtained by separate examination. It depends upon circumstances. In some cases the judge requires it, in others he does not. In *Hodges v. Hodges* (46 L. T. Rep. N. S. 366; 20 Ch. Div. 749) the order was made upon the evidence of the married woman's consent afforded by an affidavit made by her in support of the application, and a letter written by her to her solicitors strongly urging them to obtain the money for her.

Where a married woman resided in the country and was an invalid confined to her house, the order was allowed to be drawn up without a separate examination of the party, upon her consent being testified by a written request signed by her and addressed to her solicitors, her signature being verified by affidavit: (*Re Bushby*, 73 L. T. 268; 17 L. J. N. C. 106.)

In *Re Currey; Gibson v. Way*, No. 2 (56 L. T. Rep. N. S. 82; 56 L. J. N. S. 389, Ch.; 35 W. R. 326), Mr. Justice Chitty said: "I do not require the married woman to attend, unless I think it is a case in which there are some special circumstances. I do not put the married women who apply to me frequently in chambers about these matters, under the necessity of always coming to be examined, but I am very strict in finding out that it is according to their own free will. Sometimes I may require a letter, particularly when it is something about the husband's debts. I understand that, in the present case, the solicitor, a gentleman of experience, has seen the ladies alone."

In *Harris v. Harford* (85 L. T. 246; W. N., 1888, 190), North, J. said, "That in some such cases he had required a married woman to be examined separately, but he would not lay down as a rule that this was absolutely necessary in every case. He should reserve the right of requiring a separate examination in any case in which he might think it necessary. In the present case he thought the compromise would be for the benefit of the married woman, and he did not think it necessary that she should be separately examined."

It is usual to serve the trustees, but in *Re Little's Will; Re*

Harrison (57 L. T. Rep. N. S. 583; 36 Ch. Div. 701, C. A.; 56 L. J. 872, Ch.), an order was made without requiring the trustees to be served.

When, on a petition under the Settled Estates Act, 1877, the court, under Conveyancing Act, s. 39, makes an order binding the married woman's interest, the petition need not be entitled under the Conveyancing Act: (*Re Landfield's Settled Land*, 46 L. T. Rep. N. S. 227.)

The importance and utility of this section cannot be estimated merely by the number of reported cases which have been decided upon it—though they are not a few—because there are “a great many cases of this kind in chambers, and they very seldom come into court,” as Mr. Justice Chitty stated with reference to his own experience in *Re Currey*; *Gibson v. Way* (56 L. T. Rep. N. S. 80, 82). It will be seen, from a consideration of the cases cited below, that there have been considerable differences of opinion as to the liberality with which the court should exercise its powers under this section. Perhaps the high-water mark of most benevolent interpretation as yet reached will be found in *Re C.'s Settlement* (56 L. T. Rep. N. S. 299; 56 L. J. 556, Ch.), where the wife wished to pay debts which she had incurred on behalf of her husband; and in *Re Torrance* (81 L. T. 118), where the court enabled a married woman to raise money on a reversion for the purpose of buying her husband a medical practice. As a rule the Irish court seems more liberal than the English one, probably because the “times” are worse in Ireland than in this country, but the tendency of the court in England is to become more liberal. The convenient phrase “removal of restraint on anticipation,” which is often employed to denote the effect of the section, and is even used by the judicial bench (*Re Seagrave's Trusts*, 17 L. Rep. Ir. 373), is not strictly accurate, and was condemned in *Re Warren (ubi inf.)*, so that the careful practitioner in making an application under this section would do well to avoid the use of it.

Order Made.

In *Tamplin v. Miller* (30 W. R. 422; W. N. 82, p. 44), Vice-Chancellor Hall made an order sanctioning a compromise, but stated that he should require very strong grounds before acceding to applications to remove the restraint.

In *Re Landfield's Settled Land* (46 L. T. Rep. N. S. 227) the Court made an order to bind a married woman's interest on a petition for confirmation of a conditional agreement for the sale of land.

In *Hodges v. H. (supra.)*, where a married woman was, in effect,

absolutely entitled to the property in default of children, and in case she did not exercise a power of appointment, and there were no children, and she was past childbearing, an order was made that part of the fund which was in court should be paid out to her separate receipt to enable her to discharge her debts.

In *Musgrave v. Sandeman* (48 L. T. Rep. N. S. 215) the Court made the order to enable a married woman to enter into a compromise which the court thought beneficial to her; and in *Sedgwick v. Thomas* (48 L. T. Rep. N. S. 100) the Court made a like order to enable a married woman to pay the costs of all parties to an action for rectification, which costs she had undertaken to pay.

In *Re Curry; Gibson v. Way* (56 L. T. Rep. N. S. 80; W. N. 1887, p. 28) where two married women were entitled as tenants in common (restrained), the Court sanctioned a scheme for partition and settlement of the property, part of it consisting of small houses which it was desirable to lease.

In *Re C.'s Settlement* (56 L. T. Rep. N. S. 299) the lady had 1700*l.* a year (restrained), her husband was bankrupt, and the wife had given acceptances, was harassed by actions, and suffered in health. Mr. Justice Chitty enabled her to charge her income with payment of about 400*l.* a year. See also *Re Torrance* (81 L. T. 118) cited above. In *Re Waring and Colley's Settlement* (82 L. T. 301) Mr. Justice Chitty authorised the raising of money to pay debts by a loan on the wife's life interest and a policy of insurance.

In *Re Little* (57 L. T. Rep. N. S. 583; 36 Ch. Div. 701) a married woman applied for liberty to bind her life interest under a will for the purpose of raising 350*l.* on mortgage. The trustees of the will were not made parties or served, the only parties being the lady and her husband, who was made respondent. Mr. Justice Kay gave leave to raise 110*l.* only, and she appealed. The Court of Appeal gave her "liberty to bind her life interest both in possession and reversion" for the purpose of raising 300*l.* It was stated by counsel in this case that the service of trustees would greatly increase the expense. An order was also made in *Harris v. Harford* (*supra.*), and in *Ex parte Thomson* (W. N., 1884, p. 28; 76 L. T. 247, 263).

We now proceed to the Irish cases.

A fund secured by mortgage was vested in trustees in trust for the separate use of a married woman during the joint lives of herself and her husband without power of anticipation, and after the decease of either, to the survivor for life; and after the death of the survivor for their three children in equal shares. The wife had received an advantageous offer to purchase the life interest, which she desired to accept, so as to raise money to enable herself, her husband, and family, to emigrate, their pecuniary position being

very unsatisfactory. The Irish court made the order after separate examination: (*Re Flood's Trusts*, 11 L. Rep. Ir. 355.)

Trust funds to which a married woman was absolutely entitled, but subject to a restraint on anticipation, were invested on mortgages of leasehold property. One of these mortgages was not authorised by the trusts of the settlement, and the trustees proposed to call it in. The Court, on the application of the married woman being satisfied that it would be for her benefit, made order accordingly, under sect. 39, to allow the mortgage to remain: (*Re Wright's Trusts*, 15 L. Rep. Ir. 333.)

In *Re Seagrave's Trust* (17 L. Rep. Ir. 373), by a voluntary deed, lands were settled on A., the settlor, for life; remainder to B., a married woman, for life (restrained); remainder to C. (B.'s husband) for life; remainder as B. should appoint. A., B., and C. joined in a mortgage with a power of sale. The mortgagee sold at full value. It appearing that there were no other means of paying off the mortgage, that there was a danger of eviction of the lands for nonpayment of a head-rent, and that no one would give full value unless the "restraint were removed," the Irish court enabled the married woman "to confirm the mortgage" under sect. 39.

Order Refused.

In *Re Warren's Settlement* (49 L. T. Rep. N. S. 696; 52 L. J. 928, Ch.; W. N. 1883, p. 125) the Court of Appeal pointed out that this section conferred no general power of removing the restraint; but only authorised the court to sanction some particular disposition by the wife if beneficial. They refused an application by husband and wife for removal of restraint for the purpose of rendering the capital of the trust available for the benefit of husband and wife, though it was very unlikely, if not impossible, that they should have children, and in default of children the property ultimately became the husband's.

In *Re Jordan; Kino v. Pickard* (54 L. T. Rep. N. S. 127; 55 L. J. 330, Ch.; 34 W. R. 270; W. N., 1886, p. 6) the Court refused to make an order where the will, under which the married woman's interest arose, contained a general forfeiture clause which might perhaps apply to her interest. The application was dismissed with costs against the married woman, with liberty to apply if they were not paid, in which case the learned judge said he was prepared to run the risk of forfeiture by ordering payment of them out of the married woman's income: (see comments in 80 L. T. 242, 335, 372, 390.)

In *Re Wood* (78 L. T. 115) a small sum was settled on trust for the wife for life (restrained), then on usual trusts for children, with an ultimate trust for her absolutely. There were four infant chil-

dren; the husband was a solicitor's clerk, aged fifty-six, out of employment; and there was no other income available for the support of the children. Mr. Justice Kay refused an application for a portion of the capital for the maintenance of the children, and his decision was upheld by the Court of Appeal (78 L. T. 204).

In *Re Little; Harrison v. Harrison* (60 L. T. Rep. N. S. 248; 40 Ch. Div. 418; 58 L. J. 233, Ch. C. A.) the court refused to dispense with the restraint in order to give effect to a release executed by the donee of a power for her own benefit. "The court has a discretion whether it will make the order or not, even though satisfied that it will be for her benefit: (per Cotton, L.J. in *Re Little*.)

SECTION 42.

Infants.

Management
of land and
receipt and
application of
income during
minority.

42. (1.) If and as long as any person who would, but for this section, be beneficially entitled to the possession of any land is an infant, and being a woman is also unmarried, the trustees appointed for this purpose by the settlement, if any, or if there are none so appointed then the persons, if any, who are for the time being under the settlement trustees with power of sale of the settled land, or of part thereof, or with power of consent to, or approval of the exercise of such a power of sale, or if there are none, then any persons appointed as trustees for this purpose by the court, on the application of a guardian or next friend of the infant, may enter into and continue in possession of the land; and in every such case the subsequent provisions of this section shall apply. (a)

Sub-sect. (2) empowers the trustees to manage the land, fell timber, build, work mines, drain, improve, insure, accept surrenders, &c.

Sub-sect. (3) provides that they may out of income from the land and produce of sale of timber, &c., pay various expenses and outgoings.

By sub-sect. (4) they may apply or pay income for maintenance, &c., and by sub-sect. (5) they are to invest

(a) This sub-section is set out *verbatim*.

the residue and stand possessed of the accumulations on the trusts, and for the purposes declared in that sub-section. The powers of this section may be exercised with reference to infant's undivided share of land in conjunction with the persons entitled to the other share or shares (sub-sect. 6).

It only applies so far as no contrary intention is expressed (sub-sect. 7), and only when the instrument comes into operation after the 31st Dec., 1881 (sub-sect. 8).

Applications under this section will be by Originating Summons unless made in a pending action or matter, see sect. 69, sub-sect. 3 of the Act, *ante*, p. 179.

CHAPTER XVIII.

THE SETTLED LAND ACT, 1882

(45 & 46 VICT. c. 38).

10th August, 1882.

ALTHOUGH this Act only partially appertains to Originating Summons it is considered that a summary of all its provisions, with a reference to the decisions thereon, may conveniently find a place here. The sections appertaining to Originating Summons are set out *verbatim*.

Statutory
extensions of
S. L. A.

The Act has been amended or extended by the following statutes:

The Settled Land Act, 1884 (47 & 48 Vict. c. 18).

The Settled Land Act, 1887 (50 & 51 Vict. c. 30).

The Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61), s. 29.

The Housing of the Working Classes Act, 1885 (48 & 49 Vict. c. 72), s. 11 (1) (a).

These Acts will be noticed in their proper places.

It is *applied*, partially, to sales of glebe lands by the recent Glebe Lands Act, 1888 (51 & 52 Vict. c. 20), s. 8 (1).

For general principles of construction of Act see note to sect. 3, *post*, p. 191.

Commence-
ment of Act.

1. Act commences from and immediately after 31st December, 1882, and does not extend to Scotland. (b)

II. *Definitions.*

Definitions.

2. (1.) Any instrument, whether made before or after Act, under which land stands limited to persons by way of succession, creates a "settlement."

(2.) A remainder or reversion, not disposed of by settlement, is an estate coming to settlor under the settlement.

(b) Except where otherwise stated only a *summary* of each section is given.

As to what is a settlement see *Wheelwright v. Walker*, No. 1 (48 L. T. Rep. N. S. 70, 73; 23 Ch. Div. 752; 52 L. J. 274, Ch.; 31 W. R. 363); *Re Earle and Webster*, 48 L. T. Rep. N. S. 962; 24 Ch. Div. 144; 52 L. J. 828, Ch.; 31 W. R. 837), a case on sect. 63.

As to money bequeathed in trust to invest in purchase of land to be settled see *Mackenzie's Trusts* (48 L. T. Rep. N. S. 936; 23 Ch. Div. 750; 52 L. J. 526, Ch.; 31 W. R. 948), and *Re Tennant* (40 Ch. Div. 594; 60 L. T. Rep. N. S. 488; 37 W. R. 542, noted under sect. 33, *post*, p. 488.

Infants' interests in certain land which were partnership property, and thus personalty for the purposes of the partnership, were treated as within the Act: (*Re Wells*, 48 L. T. Rep. N. S. 859; 31 W. R. 764; W. N. 1883, p. 111.)

(3.) Land and any interest therein comprised in a settlement is "settled land." (a)

(4.) The question whether land is settled is governed by facts at time of settlement taking effect.

(5.) Person for time being beneficially entitled to possession for life is tenant for life.

(6.) If several persons are entitled concurrently, they together constitute the tenant for life for purposes of Act.

"Possession" in sect. 2 (5) and sect. 58 (1) is to be read in antithesis to "remainder" or reversion, "so entitled" in sect. 2 (6) means entitled under the direction in the preceding section, *i.e.*, for life (*Re Atkinson*; *Atkinson v. Bruce*, 54 L. T. Rep. N. S. 403; 31 Ch. Div. 576, 581; 34 W. R. 445, C. A.)

See this case, and *Re Clitheroe* (53 L. T. Rep. N. S. 733; 31 Ch. Div. 135; 55 L. J. 107, Ch.; 34 W. R. 169, C. A.) noted under sect. 58, *post*, p. 226.

As to sect. 2 (5) see *Re Hale and Clark (or Smyth)* (55 L. T. Rep. N. S. 151; 55 L. J. 550, Ch.; W. N. 1886, p. 65).

In *Re Collinge's Settled Estates* (57 L. T. Rep. N. S. 221; 36 Ch. Div. 516) it was decided that the tenant for life of an undivided moiety of land, where the other undivided moiety is out of settlement, cannot sell the moiety of which he is tenant for life without the concurrence of the owner of the other undivided moiety. In that case sub-sect. 10 (1) of sect. 2 appears not to have been referred to.

(a) Except where otherwise stated only a summary of each section is given.

"Beneficially entitled" in sect. 2 does not mean "entitled and deriving a benefit from it," but entitled for his own benefit if there is anything to be derived from the estate, and not simply as trustee for others (per Cotton, L.J. in *Re Jones*, 50 L. T. Rep. N. S. 466; 26 Ch. Div. 736, 743; 53 L. J. 807, Ch.; 32 W. R. 735, C. A.) In this case it was decided that a tenant for life, although in receipt of no income—it being consumed by prior charges—could sell under this Act.

(7.) Person shall be deemed tenant for life notwithstanding incumbrances. (a)

See *Re Jones* (*sup.*) and *Re Strangways*; *Hickley v. Strangways* (34 Ch. Div. 423; 55 L. T. Rep. N. S. 714; 56 L. J. 195, Ch.; 35 W. R. 83, C. A.) cited under sect. 58, *post*, p. 226.

(8.) Persons who are under a settlement trustees with power of sale of settled land, or with power of consenting to exercise of such power, or if none, then persons by settlement declared trustees for purposes of this Act are "trustees of the settlement."

To constitute persons "trustees of the settlement" they must have a *present* power of sale: (*Wheelwright v. Walker* (*ubi sup.*).

As to trustees with power to sell with consent of tenant for life, or testamentary guardians during infancy, see *Newcastle, Duke of* (48 L. T. Rep. N. S. 779; 24 Ch. Div. 129; 52 L. J. 645, Ch.; 31 W. R. 782).

A trustee with power of sale with the consent of the tenant for life is trustee for the purposes of this Act: (*Constable v. Constable*, 54 L. T. Rep. N. S. 608; 32 Ch. Div. 233; 55 L. J. 491, Ch.; 34 W. R. 470.)

A trustee of a settlement with power to sell land is sufficiently trustee for the purposes of the Act with reference to sale of heirlooms, although the settlement contains no power to sell heirlooms: (*ib.*)

But it has been held in Ireland that trustees having a power of sale only with the concurrence of another person *which cannot be obtained*, are not trustees for the purposes of the S. L. A.: (*Re Johnstone's Settlement*, 17 L. Rep. Ir., 172.)

10. (1.) Land includes incorporeal hereditaments, also undivided share in land.

(a) Except where otherwise stated only a *summary* of each section is given.

This sub-section contains definitions of other terms.

“Land” includes a dignity or title of honour, but the Act does not enable the holder to sell it: (*Re Sir J. Rivett Carnac's Will* 53 L. T. Rep. N. S. 81; 30 Ch. Div. 136, 140; 54 L. J. 1074, Ch.; 33 W. R. 837; *Re Earl of Aylesford's S. E.*, 54 L. T. Rep. N. S. 414; 32 Ch. Div. 162.)

It includes [certain] tithes: (*Re Esdaile*, 54 L. T. Rep. N. S. 637, W. N. 1886, p. 47.)

III. Sale; Enfranchisement; Exchange; Partition.

Sect. 3 gives a general power of sale and exchange over the settled land, including power to grant easements, &c., to sell a seignory and to enfranchise, and to exchange, and to concur in a partition. (a)

Sect. 4. Sale is to be at the best price, but may be made by auction or private contract, and under special conditions, and with reservation of minerals. Settled land in England is not to be exchanged for land out of England.

The Act is to be construed liberally, per Chitty, J., in *Duke of Rutland's Settlement* (49 L. T. Rep. N. S. 196; 31 W. R. 947); and in furtherance of the important objects of public policy for which it was passed, per Lord Selborne, in *Re Hazle's S. E.* (29 Ch. Div. 78, 83; 52 L. T. Rep. N. S. 947; 53 L. J. 514, Ch.; 33 W. R. 759, C. A.)

“Most ample and abundant powers are given to the tenant for life of saying that the property shall be sold,” per Bacon, V.C., in *Thomas v. Williams* (49 L. T. Rep. N. S. 111; 24 Ch. Div. 558; 52 L. J. 603, Ch.; 31 W. R. 943).

The object of the Act is to give a tenant for life “very large powers for his own benefit”: (*Re Duke of Newcastle*, 24 Ch. Div. 129, 137; 48 L. T. Rep. N. S. 779; 52 L. J. 645, Ch.; 31 W. R. 782).

He has absolute power to sell for any purpose, even for mere caprice (*Re Chaytor*, 50 L. T. Rep. N. S. 88; 25 Ch. Div. 651, 654; 53 L. J. 212, Ch.; 32 W. R. 517; *Cardigan v. Curzon Howe*, 53 L. T. Rep. N. S. 704; 30 Ch. Div. 531, 540; 55 L. J. 71, Ch.; 33 W. R. 836); or to disappoint his successor: (*Wheelwright v. Walker* (No. 1), 48 L. T. Rep. N. S. 70; 23 Ch. Div. 752; 31 W. R.

(a) Except where otherwise stated only a summary of each section is given.

363; 52 L. J. 274, Ch.) He is not bound to wait on the mere probability of obtaining a better price: (*Thomas v. Williams*, 49 L. T. Rep. N. S. 111; 24 Ch. Div. 558.) This last case was appealed, and an *interim* injunction obtained from the Court of Appeal to stop the sale pending the appeal (75 L. T., July 28, 1884, p. 234). The appeal was ultimately withdrawn.

The Act gives the tenant for life a power overriding the settlement or will under which he takes, and he can exercise his power of sale without the leave of the court, although an administration decree (made before the Act) is pending. *Semble*, he could equally do so had the decree been made subsequently: (*Cardigan Curzon Howe*, *sup.*)

Housing of
working
classes.

By 48 & 49 Vict. c. 72, s. 11 (1) (a) sales, exchanges, or leases may be made for erection of dwellings for the "working classes" at such price, &c., as may be reasonably obtained *for that purpose*: (See *post*, Chapter XX.)

Sect. 5. Where the land is incumbered, the incumbrance may, with consent of the incumbrancer, be transferred to other part of the settled land. (a)

IV. Leases.

Sect. 6. Tenant for life may lease settled land or any easement, &c., for any purpose, "whether involving waste or not," for term not exceeding, in case of building lease, ninety-nine years, mining lease sixty years, other lease twenty-one years.

General regu-
lations.

Sect. 7. Leases to be by deed and at best rent, but fine (b) may be taken and regard had to improvements. Counterpart is to be executed, &c. A statement in the lease, or indorsed thereon, signed by the tenant for life, is to be evidence, in favour of the lessee, of the facts stated in relation to this Act.

Building
leases.

Sect. 8. In building leases a nominal rent, or any rent less than that ultimately payable, may be reserved for first five years. Provision is made for the apportionment of rent when land is agreed to be leased in lots.

(a) Except where otherwise stated only a *summary* of each section is given.

(b) Such fine will be capital money. See S. L. A. 1884, sect. 4.

As to what is not a building lease, see *Sabin's S. E.* (W. N., 1885, p. 197.)

Sect. 9. In mining leases, rent may be by acreage or quantity of substance gotten or disposed of; a minimum rent may be made payable. (a) Mining leases

Sect. 10. (1.) Where it is shown to the court with respect to the district in which any settled land is situate, either— Variation of building or mining lease according to circumstances of district.

(i.) That it is the custom for land therein to be leased or granted for building or mining purposes for a longer term or on other conditions than the term or conditions specified in that behalf in this Act, or in perpetuity; or

(ii.) That it is difficult to make leases or grants for building or mining purposes of land therein, except for a longer term or on other conditions than the term and conditions specified in that behalf in this Act, or except in perpetuity;

the court may, if it thinks fit, authorise generally the tenant for life to make from time to time leases or grants of or affecting the settled land in that district, or parts thereof, for any term or in perpetuity, at fee-farm or other rents, secured by condition of re-entry, or otherwise, as in the order of the court expressed, or may, if it thinks fit, authorise the tenant for life to make any such lease or grant in any particular case.

(2) Thereupon the tenant for life, and, subject to any direction in the order of the court to the contrary, each of his successors in title being a tenant for life, or having the powers of a tenant for life under this Act, may make in any case, or in the particular case, a lease or grant of or affecting the settled land, or part thereof, in conformity with the order. (b)

(a) Except where otherwise stated only a summary of each section is given.

(b) This section is set forth *verbatim*.

Mode of
application.

The application to the court is made by Originating Summons, but it may be made by petition: (see sect. 46 (3), *post*, p. 220; and r. 2, *post*, p. 235. If, however, a petition is presented without direction of the judge only summons' costs are allowed: (see r. 2.)

The application, if made by the tenant for life, will not in the first instance be served on any person: (rule 5, *post*, p. 235.)

For Forms of Summons, see Forms II., III., IV., V. (*post*, p. 240) according to circumstances.

As to affidavit in support, see r. 7, *post*, p. 236, and Form VIII., *post*, p. 244.

Where the Court authorises generally the tenant for life to grant leases under sect. 10, it will not usually direct the particular lease to be settled by the judge: (rule 9, *post*, p. 236.)

As to application by trustees in case of an infant, see *Cecil v. Langdon* (54 L. T. Rep. N. S. 418), cited under sect. 60, *post*, p. 230.

Mining lease.

Sect. 11. Where a tenant for life is impeachable for waste, three-fourths of mining rent shall be set aside as "capital money" (sect. 21), otherwise one-fourth shall be so set aside. This is subject to contrary intention being expressed in the "settlement." (a)

Where a person was entitled to income of money to arise from sale, and to rents and profits until sale, it was held she was entitled only to one-fourth of the rents and royalties from mining lease: (*Re Ridge*; *Hellard v. Moody*, 54 L. T. Rep. N. S. 549; 31 Ch. Div. 504; 55 L. J. 265, Ch.; 34 W. R. 159, C. A.)

"Contrary intention" was held to be expressed in *Duke of Newcastle* (24 Ch. Div. 129; 48 L. T. Rep. N. S. 779; 52 L. J. 645, Ch.)

For Form of Summons, under sect. 22, for payment into court by lessee under a mining lease, see Form X., *post*, p. 245.

Sect. 12 empowers the tenant for life to lease for the purpose of giving effect to certain contracts for leases and covenants for renewal, and for confirming certain void or voidable leases.

Surrenders.

Sect. 13. Tenant for life may accept surrender, with or without consideration, of all or part of the land leased.

(a) Except where otherwise stated only a *summary* of each section is given.

Rent may be apportioned, and new leases, in conformity with the Act, made. (*a*)

See *Re Hazle's Settled Estates*, cited at p. 191, *supra*, and p. 227, *infra*.

Sect. 14. Tenant for life may grant licences for copy- Copyholds. holders to make such leases as tenants for life can make, under this Act, of freehold land. The licence may fix the annual value whereon fines, fees, &c., are to be assessed, or the amount of the fines, fees, &c.

As to the effect of the Act on leases of copyholds, see Greenwood's R. P. Acts, 2nd edit., p. 485.

V. Sales, Leases, and other Dispositions.

Mansion and Park.

Sect. 15. Notwithstanding anything in this Act, the principal mansion house on any settled land, and the demesnes thereof, and other lands usually occupied therewith, shall not be sold or leased by the tenant for life, without the consent of the trustees of the settlement, or an order of the court. (*b*)

The application to the court will be made by Originating Sum- Mode of mons; but see sect. 46 (3), *post*, p. 220. and r. 2, *post*, p. 235. application.

And if made by the tenant for life will be served on the trustees, see rule 4, *post*, p. 235.

As to authorising leases of the mansion house under this section, rule 9, p. 236.

For Forms of Summons. see Forms II., IV., to VII., *post*, pp. 240, 243; and for Form of Affidavit, Form VIII., p. 244.

An order for sale of the mansion house was made in *Re J. B. Brown's Will* (51 L. T. Rep. N. S. 15; 27 Ch. Div. 179; 53 L. J. 920, Ch.; 32 W. R. 894).

Notwithstanding a forfeiture clause for non-residence, letting of the castle of Clonskeagh, County Dublin, was authorised in *Re Thompson* (21 L. Rep. Ir. 109; 85 L. T. 4); and, similarly, sale of a mansion house was sanctioned in *Re Paget's S. E.* (53 L. T. Rep. N. S. 90; 30 Ch. Div. 161; 55 L. J. 42, Ch.; 33 W. R. 898).

(*a*) Except where otherwise stated only a summary of each section is given.

(*b*) This section is given *verbatim*.

The court refused to authorise a sale of the mansion house on the application of tenant for life where his mortgagees (his life estate being mortgaged up to the full value) did not consent, the trustees did not consent, and full information was not given to the court: (*Re Sebright's S. E.*, 55 L. T. Rep. N. S. 570; 33 Ch. Div. 429; 56 L. J. 169, Ch.; 35 W. R. 49, C. A.)

Building.

Sect. 16. In connection with sale or lease for building purposes, tenant for life may dedicate land for streets, open spaces, &c., "for the general benefit of the residents" on the settled land. (a)

Mining.

Sect. 17. Land may be sold, exchanged, partitioned, or let on mining lease with reservation of mines, way-leaves, &c.

A settlement, made before the Act, contained no power to sell surface apart from the minerals. The court held that the trustees might exercise the power contained in sect. 17 without the fetter of consent of the guardians of the infant tenant in tail. See *Duke of Newcastle's Estates* (24 Ch. Div. 129; 48 L. T. Rep. N. S. 779; 52 L. J. 645, Ch.; 31 W. R. 782).

Mortgage.

Sect. 18. Tenant for life may raise money for enfranchisement, or equality of exchange or partition, by mortgage of the settled land.

It will be observed that the tenant for life has no *general* power to mortgage under the Act.

For Form of Summons, under sect. 22, for payment into court by mortgagee, see Form XI., p. 245.

Undivided share.

Sect. 19. Tenant for life of undivided share in land may concur in exercise of powers.

The tenant for life of an undivided moiety of land, where the other undivided moiety is out of settlement, cannot sell the moiety of which he is tenant for life without the concurrence of the owner of the other undivided moiety: (*Re Collinge's S. E.* (57 L. T. Rep. N. S. 221; 36 Ch. Div. 516.) See *ante*, p. 189.

Completion and conveyance.

Sect. 20. For completing any sale, lease, &c., tenant for life may convey land sold, &c., for the estate, the

(a) Except where otherwise stated only a *summary* of each section is given.

subject of the settlement, discharged from provisions of settlement, and all charges thereunder, except charges prior to settlement, and charges created for securing money actually raised at date of deed, and leases and easements granted for value before date of conveyance by tenant for life. (a)

In case of deed affecting copyholds it is sufficient to enter same on court rolls, and on payment of fines, &c., purchaser, &c., to be admitted accordingly, but steward may require settlement to be entered on rolls.

Where a "tenant for life" under a will sold before the admittance of the devisees in trust it was held that the lord could only claim one fine: (*Re Naylor and Spendla's Contract* (56 L. T. Rep. N. S. 132; 34 Ch. Div. 217; 56 L. J. 453, Ch.; 35 W. R. 219, C. A., *dissentiente* Fry, L.J.)

VI. Investment.

21. Capital money shall, subject to payment of claims properly payable thereout (b) and to special object for which same raised, be invested (1) on Government securities, or on securities on which trustees of settlement are thereby or by law authorised to invest trust moneys, (c) or on the bonds, mortgages, debentures, or debenture stock (d) of any railway company in Great Britain or Ireland, incorporated by special Act, and having for ten years next before investment paid dividend on ordinary stock or shares, with power to vary investments, (2) in discharge of incumbrances, (e) land-tax, tithe rent charge, Crown rent, chief or quit rent, charged on settled land (3, 4, 5, 6) in payment for "improvement" (f) authorised by Act or for equality of exchange or partition, or in purchase of seignior of freehold settled land,

(a) Except where otherwise stated only a summary of each section is given.

(b) For wide construction of these words, see *Re Duke of Leinster's S. E.* (23 L. Rep. Ir. 152), cited p. 201 below.

(c) See p. 198, below.

(d) See p. 201, *post*.

(e) See p. 202, *post*

(f) See p. 202, *post*.

or in purchase of fee simple of copyhold settled land, or in purchase of reversion of leasehold settled land, (7) in purchase of land (a) in fee simple or copyholds, or leasehold having sixty years or more unexpired, or (8) in purchase in fee, or for sixty years or more, of minerals convenient to hold with settled land, or of any easement so convenient, (9) in payment to person absolutely entitled (b) or able to give receipt, (10) in payment of costs (c) of exercise of powers of this Act, (11) in any other mode in which money produced by power of sale in settlement is applicable thereunder. (d)

**Trustees'
investments.**

[As to the securities on which trustees are by law authorised to invest trust moneys, see Wolstenholme and Turner's *Settled Land Acts*; Ellis's *Trustees' Guide to Investments*, 2nd edit., p. 12, *et seq.*; Geare's *Investment of Trust Funds*, 2nd edit., p. 90, *et seq.*; and Macey's *Epitome of Conveyancing Statutes*, 4th edit., p. 90-92; and the *Trustee Act, 1888* (51 & 52 Vict. c. 59, Mr. Cozens-Hardy's Act).

By 23 & 24 Vict. c. 38, trustees, executors, or administrators having power to invest in Government or parliamentary securities may invest on any securities in which cash under the control of the court may be invested.

By Order XXII. r. 17 (being the new rule of the 14th Nov., 1888, which came into operation on the 26th Nov., 1888, and is in substitution for the former Order XXII., r. 17, see Indermaur's *Manual of Practice*, 5th edit., p. 216, note, and W. N., 24th Nov., 1888, p. 523, cash under the control of or subject to the order of the court may be invested in the following stocks, funds, or securities, namely :

Two and Three-quarters per Cent. Consolidated Stock
(to be called after the 5th April, 1903, Two-and-a-Half per Cent. Consolidated Stock).

Consolidated Three Pounds per Cent. Annuities.

Reduced Three Pounds per Cent. Annuities.

(a) See p. 202, *post*.

(b) See p. 202, *post*.

(c) See p. 202, *post*.

(d) Except where otherwise stated only a *summary* of each section is given.

Two Pounds Fifteen Shillings per Cent. Annuities.

Two Pounds Ten Shillings per Cent. Annuities.

Local Loans Stock under the National Debt and Local Loans Act, 1887.

Exchequer Bills.

Bank Stock.

India Three-and-a-Half per Cent. Stock.

India Three per Cent. Stock.

Indian Guaranteed Railway Stocks or Shares provided in each case that such stocks or shares shall not be liable to be redeemed within a period of fifteen years from the date of investment.

Stocks of Colonial Governments guaranteed by the Imperial Government.

Mortgage of freehold and copyhold estates respectively in England and Wales.

Metropolitan Consolidated Stock Three Pounds Ten Shillings per Cent.

Three per Cent. Metropolitan Consolidated Stock.

Debenture, preferred, guaranteed, or rent-charge stocks of railways in Great Britain or Ireland, having for ten years next before the date of investment paid a dividend on ordinary stock or shares.

Nominal debentures or nominal debenture stock under the Local Loans Act, 1875, provided in each case that such debentures or stocks shall not be liable to be redeemed within a period of fifteen years from the date of investment.

2. This rule shall come into operation on the 26th Nov., 1888, and may be cited as the Rule of the Supreme Court, November, 1888, or may be cited according to the heading thereof with reference to the Rules of the Supreme Court, 1883.]

The following further considerable additions have been made to the powers of investment and application given by sect. 21 of the Settled Land Act, 1882.

Extensions of
S. L. A.
powers of
investment.

(1.) By the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 29, capital money arising under the S. L. A. may be applied in payment of any moneys expended, and costs incurred by a landlord under or in pursuance of that Act, in or about the execution of any improvement mentioned in Parts 1 or 2 of the schedule thereto, as for an improvement authorised by the S. L. A., and also in discharge of certain charges created under the A. H. Act. (a)

(2.) Under the Housing of the Working Classes Act, 1885 (48 & 49 Vict. c. 72), s. 11 (1), (b):

“The improvements on which capital money may be expended, enumerated in section twenty-five of the said Act [the S. L. A. 1882], and referred to in section thirty of the said Act, shall, in addition to cottages for labourers, farm servants, and artizans, whether employed on the settled land or not, include any dwellings available for the working classes, the building of which, in the *opinion of the court*, is not injurious to the estate.”

Where there is no pending action the “*opinion of the court*” will be obtained by Originating Summons. The summons will be entitled *In the matter of the S. L. A., 1882*, and *In the matter of the Housing of the Working Classes Act, 1885*.

(3.) By the Settled Land Acts (Amendment) Act, 1887 (50 & 51 Vict. c. 30) rent charges (temporary or perpetual) created for the purpose of paying off money advanced for improvements of a kind authorised by the S. L. A. 1882, may be redeemed or paid by means of capital money; whether the improvement was made before or after the passing of the Act of 1887.

This Act is believed to have been passed in consequence of *Knatchbull's S. E.* (53 L. T. Rep. N. S. 284; 29 Ch. Div. 588;

(a) Except where otherwise stated only a *summary* of each section is given.

54 L. J. 1168, Ch.; 33 W. R. 569, C. A.). But it has been held that only instalments representing capital of a terminable charge, and not those representing interest can be so paid off out of capital money: (*Re Lord Sudeley's S. E.*, 58 L. T. Rep. N. S. 7; 37 Ch. Div. 132; 57 L. J. 182, Ch.; 36 W. R. 162.) And in Ireland it was held that terminable payments representing commuted tithe rentcharge, which was ordered to be redeemed, could not be paid off out of capital money, though the court made an order (under sect. 21 (1) partly re-couping the tenant for life: (*Re Duke of Leinster's S. E.*, 23 L. R. Ir. 152.)

Purchase moneys of settled lands were applied in redemption of rentcharges payable to the Board of Works for terminable loans for drainage and improvements. The tenant for life was to pay part himself and the tenants in remainder consented. Also some irrecoverable costs were ordered to be paid out of the fund in court: (*Re Navan and King's Court Railway Company*, 21 L. Rep. Ir. 369, cited in 86 L. T. 344.)

Notes to Sect. 21 of S. L. A., 1882.

As to distinction between "investment" and "application" of capital money, and for general scope of sect. 21, see *Re Duke of Marlborough's Settlement* (54 L. T. Rep. N. S. 914; 32 Ch. Div. 1, 7, 10; 55 L. J. 339, Ch.; 34 W. R. 377, C. A.)

Sub-sect. (i.) Under this sub-section the court has authorised interim investment in debenture stock of the London and North-Western Railway (*Byron's Charity*, 48 L. T. Rep. N. S. 515; 23 Ch. Div. 171; 53 L. J. 152, Ch.; 31 W. R. 517) and of the Great Western Railway (*Anon.*, 74 L. T., Jan. 20, 1883, page 208). But in every case where an investment in debenture stock of a railway company is asked for under S. L. A., s. 21 (1), it is necessary to produce evidence that the railway company has for ten years next before the date of investment paid a dividend on its ordinary stock or shares: (*Byron's Charity*, *ubi sup.*) Apparently, even in the case of railways where the court has already had evidence to satisfy it that the railways fall within the above-mentioned privileged class, it will be necessary to prove it again, because the ten years are to be reckoned from the time of investment.

Notwithstanding the Local Loans Act, 1875 (38 & 39 Vict. c. 83), s. 27, this section does not empower investment in debentures or debenture stock issued by a local authority under that Act unless *perhaps* where the corporation have paid a dividend for ten years: (*Re Maberley*; *Maberley v. Maberley*, 55 L. T. Rep. N. S. 164; 33 Ch. Div. 455, 459; 56 L. J. 54, Ch.; 34 W. R. 771), but see rule of Nov., 1888, *supra*.

Money to be laid out in purchase of land to be settled may be invested under this section in debenture stock: (*Re Mackenzie's Trusts*, 48 L. T. Rep. N. S. 936; 23 Ch. Div. 750; and see *Re Maberley*; *Maberley v. Maberley*, *ubi sup.*)

Sub-sect. (ii.) Purchase money can be applied in discharge of a mortgage affecting *part* of the land settled: (*Re Chaytor's S. E.*, 50 L. T. Rep. N. S. 88; 25 Ch. Div. 651, 654; 53 L. J. 312, Ch.; 32 W. R. 517.)

Proceeds of sale of chattels settled as heirlooms may be applied in discharge of incumbrances affecting the inheritance of the settled land without keeping such incumbrances on foot for the benefit of the infant remainderman in whom the heirlooms would, if unsold, have vested absolutely on attaining, twenty-one: (*Duke of Marlborough v. Marjoribanks*, 32 Ch. Div. 1; 55 L. J. 339, Ch., C. A.)

Proceeds of sale of land sold by the tenant for life can also be applied in paying off a debt secured by a mortgage of a "long term" within Conveyancing Act, 1881, s. 65: (*Re Frewin*; *Frewin v. James*, 59 L. T. Rep. N. S. 131; 38 Ch. Div. 383; 36 W. R. 840.)

See also the extensions effected by statutes cited at p. 200, *ante*, and *Re Esdaile* (54 L. T. Rep. N. S. 637; W. N. 1886, p. 47.)

Sub-sect. (iii.) "Improvements:" (see sects. 25, 26, and cases thereon, *post*, p. 205.)

Sub-sect. (vii.) "Land." See *Re Houghton Estate* (53 L. T. Rep. N. S. 196; 30 Ch. Div. 102, 107; 55 L. J. 37, Ch.; 33 W. R. 869), where erection of an agent's house was allowed; and *Lytton's S. E.* (W. N. 1884, p. 193; Sol. Jour. Aug. 9th, 1884, p. 722), where erection of two villas was allowed.

In *Re Walker* (77 L. T., Aug. 9th, 1884), the court refused to sanction *purchase* of a London freehold house of residence. See also sects. 25, 26.

Sub-sect. (ix.) see *Cookes v. Cookes* (56 L. T. Rep. N. S. 160; 34 Ch. Div. 498, 502; 56 L. J. 397, Ch.; 35 W. R. 402). The court is not bound to order payment out to trustees: (*Re Samuel Smith*; *Ex parte London and North-Western Railway and Midland Railway*, 60 L. T. Rep. N. S. 77; 40 Ch. Div. 386; 59 L. J. 108, Ch., C.A.).

Sub-sect. (x.) "Costs." See *Re Rudd* (W. N. 1871, p. 251), and *Re Llewellyn* (W. N. 1871, p. 255), and notes under sects. 46, 53, below. On sale by tenant for life with consent of mortgagees of his life interest, the costs of the mortgagees in relation to the sale are not payable out of the purchase money: (*Cardigan v. Curzon Howe*, 60 L. T. Rep. N. S. 254; 40 Ch. Div. 338; 58 L. J. 177, Ch., affirmed; W. N. 1889, p. 84; 86 L. T., p. 462, C. A.)

On a sale by a tenant for life under this Act, the charges of auctioneers for preparing an elaborate report and valuation of estate were not allowed to be paid out of capital money: (*Re Eyton's Estate*, 86 L. T., Dec. 22, 1888, p. 143; W. N. 1888, p. 254.)

The court has a discretion to allow trustees to retain unauthorised securities, but will not do so merely because they are within the class permitted by the S.L.A. and conversion will reduce the income: (*Fox v. Dolby*, W. N. 1883, p. 29.)

The court refused to allow purchase money received by the trustees of the settlement to be sent to the executors in America for investment without the consent of the persons ultimately contingently entitled to the fund: (*Re Lloyd; Edwards v. Lloyd*, 54 L. T. Rep. N. S. 643; W. N. 1886, p. 37.)

Trustees were not authorised to spend money in carrying on farm until completion of sale; but salvage expenditure might be allowed afterwards: (*Round v. Turner*, 60 L. T. Rep. N. S. 379; W. N. 1889, p. 38.)

Sect. 22. (1.) Capital money arising under this Act shall, in order to its being invested or applied as aforesaid, be paid either to the trustees of the settlement or into court, at the option of the tenant for life, and shall be invested or applied by the trustees, or under the direction of the court, as the case may be, accordingly. (a)

Regulations
respecting
investment
devolution
and income of
securities, &c.

(2.) The investment or other application by the trustees shall be made according to the direction of the tenant for life, and in default thereof, according to the discretion of the trustees, but in the last-mentioned case subject to any consent required or direction given by the settlement with respect to the investment or other application by the trustees of trust money of the settlement; and any investment shall be in the names or under the control of the trustees.

(3.) The investment or other application under the direction of the court shall be made on the application of the tenant for life, or of the trustees.

(a) This section is set out *verbatim*.

(4.) Any investment or other application shall not during the life of the tenant for life be altered without his consent.

(5.) Capital money arising under this Act while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made, shall, for all purposes of disposition, transmission, and devolution, be considered as land, and the same shall be held for and go to the same persons successively, in the same manner and for and on the same estates, interests, and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement.

(6.) The income of those securities shall be paid or applied as the income of that land, if not disposed of, would have been payable or applicable under the settlement.

(7.) Those securities may be converted into money, which shall be capital money arising under this Act. (a)

The application to the court under this section will be by Originating Summons; but see sect. 46 (3) *post*, p. 220, and r. 2, *post*, p. 235.

As to service, see rr. 4, 5, p. 235.

For practice see rr. 10-14, p. 237.

For forms of summons see Forms IX., X., and XI., *post*, p. 244.

Sub-sect. (1). Where a tenant for life consented to purchase money being paid into court to meet a purchaser's objections, it was held that he had exercised his option given to him by this section and that the money could not be paid out to the trustees but must be invested or applied under the direction of the court: (*Cookes v. Cookes*, 34 Ch. Div. 498, *ante*, p. 202.)

This case differs from the cases where money paid in under the L. C. C. Act, 1845, was paid out to trustees: (see sect. 32, p. 210, below.

Sect. 23. Capital money, arising from settled land in

(a) This section is set out *verbatim*.

England, not to be invested in land out of England, unless settlement otherwise directs. (a)

Sect. 24 directs the mode of settlement of land purchased, taken in exchange, &c. The beneficial interest in leaseholds for years is not to vest in infant tenant in tail by purchase, but, on his death under twenty-one years, to pass as settled freehold land would do. Special powers are given as to subjecting newly-acquired land to charges affecting the old settled land.

VII. *Improvements.*

Sect. 25. "Improvements" authorised by this Act are the making for benefit of settled land of following works :—

Drainage, irrigation, embanking, groynes, enclosing, reclamation, roads, cottages, farm buildings, mills, reservoirs, tramways, jetties, market-places, streets, sewers, trial pits for mines, &c., &c., and the reconstruction or improvement of any of such works.

"Ordinary repairs cannot be done at the expense of capital money," but sect. 25 includes many works which would not have been considered permanent improvements under the old doctrine of the court. One of the objects of the Act is the improvement of land: (*Clarke v. Thornton* (56 L. T. Rep. N. S. 294; 35 Ch. Div. 307, 311; 56 L. J. 302, Ch.; 35 W. R. 603.)

The following improvements have been authorised :—New road, *Re Bethlehem* (74 L. T. 466); sea walls, *Re Bethlehem and Bridewell Hospitals* (53 L. T. Rep. N. S. 558; 30 Ch. Div. 541; 54 L. J. 1143, Ch.); water supply, house drainage, rebuilding of stables, building of agent's house and two cottages, *Re Houghton Estate* (53 L. T. Rep. N. S. 196; 30 Ch. Div. 102; 55 L. J. 37, Ch.; 33 W. R. 869.)

As to water supply, see also *Re Bulwer Lytton's Will*, cited under sect. 26, below.

As to buildings, see pp. 200, 202, above. Silos were not allowed: (*Re Broadwater Estate*, 53 L. T. Rep. N. S. 745; 54 L. J. 1104, Ch.; 33 W. R. 738, C. A.)

(a) Except where otherwise stated only a summary of each section is given.

Approval of
scheme for
improvement.

Sect. 26. (1.) Where the tenant for life is desirous that capital money arising under this Act shall be applied in or towards payment for an improvement authorised by this Act, he may submit for approval to the trustees of the settlement, or to the court, as the case may require, a scheme for the execution of the improvement, showing the proposed expenditure thereon. (a)

(2.) Where the capital money to be expended is in the hands of trustees, then, after a scheme is approved by them, the trustees may apply that money in or towards payment for the whole or part of any work or operation comprised in the improvement, on—

(i.) A certificate of the Land Commissioners certifying that the work or operation, or some specified part thereof, has been properly executed, and what amount is properly payable by the trustees in respect thereof, which certificate shall be conclusive in favour of the trustees as an authority and discharge for any payment made by them in pursuance thereof; or on

(ii.) A like certificate of a competent engineer or able practical surveyor nominated by the trustees and approved by the commissioners, or by the court, which certificate shall be conclusive as aforesaid; or on

(iii.) An order of the court directing or authorising the trustees to so apply a specified portion of the capital money.

(3.) Where the capital money to be expended is in court, then, after a scheme is approved by the court, the court may, if it thinks fit, on a report or certificate of the commissioners, or of a competent engineer or able practical surveyor, approved by the court, or on such other evidence as the court thinks sufficient, make such order

(a) This section is set out *verbatim*.

and give such directions as it thinks fit for the application of that money, or any part thereof, in or towards payment for the whole or part of any work or operation comprised in the improvement. (a)

The application to the court under this section will be made by **Mode of** Originating Summons; but see sect. 46 (3) *post*, p. 220, and r. 2, **application.** *post*, p. 235.

As to service, see rr. 4, 5, p. 235.

For form of Summons under sub-sect. (1), see Form XII., p. 246; under sub-sect. (2) (ii.) see Form XIII. *post*, p. 246, and for nomination of surveyor or engineer for the purposes of sect. 26, sub-sect. (2) (ii.), see Form XIV., p. 247; under sub-sect. 2 (iii.), see Form XV., p. 247; and under sub-sect. 3, see Form XVI., p. 247.

Semble, trustees should appear separately from the tenant for life on application for an order for payment for improvements under sect. 21: (*Re Broadwater Estate*, 53 L. T. Rep. N. S. 745; 33 W. R. 738; 54 L. J. 1104, Ch., C. A.) It is very doubtful whether the court will authorise the expenditure for work done without its previous sanction (per Cotton, C.J. in *Re Broadwater*). In order that the court may sanction the expenditure, the Scheme must be submitted by the tenant for life to the trustees *before* the works are commenced: (*Re Hotchkin's S. E.*, 56 L. T. Rep. N. S. 244; 35 Ch. Div. 41; 35 W. R. 463; 56 L. J. 445, Ch., C. A.)

It is doubtful whether expense of improvements on lands which have been sold, can be afterwards paid out of capital money (per Cotton, L.J., the other judges not expressing an opinion).

The tenant for life has power to require capital money to be laid out under a proper scheme for the improvement of land; and if the trustees decline, the money being in their hands, the court will direct or authorise them to comply with the tenant for life's scheme, although there is a discretionary trust enabling them to apply income to that purpose. The case is the same if the money is in court: (per Chitty, J. in *Clarke v. Thornton*, *ante*, p. 205, followed in *Re Lord Stamford's Estate*, 56 L. T. Rep. N. S. 484.)

Where a general (and not conditional) approval of a scheme for water supply to a mansion and building estate had been approved by trustees, it was held that certain extra expenditure might be defrayed out of capital money: (*Re Bulwer Lytton's Will*, 38 Ch. Div. 20; 59 L. T. Rep. N. S. 12; 57 L. J. 340, Ch.; 36 W. R. 420; C. A.)

Sect. 27. Tenant for life may concur with others interested in executing "improvements." (a)

Sect. 28. This section renders it obligatory on tenant for life, and his successors, during such period as Land Commissioners prescribe, to repair and insure "improvements;" and in default any person interested under the settlement may sue him, and his estate is liable after his death.

Sect. 29. Tenant for life may enter on settled land and execute "improvements," and for that purpose get and work limestone, &c., and make bricks, and cut and use timber not planted for shelter or ornament.

Sect. 30. "Improvements" mentioned in sect. 9 of Improvement of Land Act, 1864, is extended to "improvements" authorised by this Act.

VIII. *Contracts.*

Power for
tenant for life
to enter into
contracts.

Sect. 31. (1) A tenant for life (b)—

- (i.) May contract to make any sale, exchange, partition, mortgage, or charge; and
- (ii.) May vary or rescind, with or without consideration, the contract, in the like cases and manner in which, if he were absolute owner of the settled land, he might lawfully vary or rescind the same, but so that the contract as varied be in conformity with this Act; and any such consideration, if paid in money, shall be capital money arising under this Act; and
- (iii.) May contract to make any lease; and in making the lease may vary the terms, with or without consideration, but so that the lease be in conformity with this Act; and
- (iv.) May accept a surrender of a contract for a lease,

(a) Except where otherwise stated only a *summary* of each section is given.

(b) This section is set out *verbatim*.

in like manner and on the like terms in and on which he might accept a surrender of a lease ; and thereupon may make a new or other contract, or new or other contracts, for or relative to a lease or leases, in like manner and on the like terms in and on which he might make a new or other lease, or new or other leases, where a lease had been granted ; and

(v.) May enter into a contract for or relating to the execution of any improvement authorised by this Act, and may vary or rescind the same ; and

(vi.) May, in any other case, enter into a contract to do any act for carrying into effect any of the purposes of this Act, and may vary or rescind the same.

(2.) Every contract shall be binding on and shall enure for the benefit of the settled land, and shall be enforceable against and by every successor in title for the time being of the tenant for life, and may be carried into effect by any such successor ; but so that it may be varied or rescinded by any such successor, in the like case and manner, if any, as if it had been made by himself.

(3.) The court may, on the application of the tenant for life, or of any such successor, or of any person interested in any contract, give directions respecting the enforcing, carrying into effect, varying, or rescinding thereof.

(4.) Any preliminary contract under this Act for or relating to a lease shall not form part of the title or evidence of the title of any person to the lease, or to the benefit thereof. (a)

(a) This section is set out *verbatim*.

Mode of
application.

The application to the court, under sub-sect. (3) will be by Originating Summons; but see sect. 46 (3) *post*, p. 220, and r. 2, *post*, p. 235.

As to service see rr. 4, 5, p. 235.

For form of summons, see Form XVII., p. 248.

For affidavit, see r. 7, and Form VIII., pp. 236, 244.

The fact that at the time the tenant for life enters into a contract for sale there are no trustees of the settlement, will not prevent his making a statutory title, provided such trustees are subsequently duly appointed: (*Hatten v. Russell*. 58 L. T. Rep. N. S. 271; 38 Ch. Div. 334; 57 L. J. 425, Ch.; 36 W. R. 317).

IX. Miscellaneous Provisions.

Money in
court.

Sect. 32. Money in court under the Lands Clauses Consolidation Acts or the Settled Estates Act, 1877, or any other Act (whether paid in before or after this Act), and liable to be laid out in purchase of land to be settled, may be invested or applied as capital money under this Act (see sects. 21, 25). (*a*)

As to this section and L. C. C. Act see note to R. S. C., Order LV., r. 2 (7) p. 63 above.

In the following cases orders for investment or application have been made under sect. 32:—

Byron's Charity, see under sect. 21 (i.). p. 201 above.

Lytton's S. E., under sect. 21 (vii.) p. 202 above.

Re Bethlehem and Bethlehem and Bridewell, see under sect. 25, p. 205, above.

In *Re Lytton's S. E.*, the company had to pay the costs of application for money to be spent in building. Where a fund in court had been paid in by the Commissioners of Sewers under their private Act, which made provision for investment in Consols only, it was held that the fund might be invested in debenture stock as an interim investment at the expense of the commissioners, although the expense of investment in debenture stock exceeds that of investment in Consols: (*Hanbury's Trusts*, 52 L. J. 687, Ch.; 31 W. R. 784; 75 L. T., June 23, 1883, p. 146; and W. N. 1883, p. 116.

Where trustees, one of whom was tenant for life, had upon an investment of trust moneys on a mortgage of land overdrawn their bankers' account in order to find the sum required, relying for

(*a*) Except where otherwise stated only a summary of each section is given.

payment upon a fund paid into court under the L. C. C. Act, the court, upon their petition, allowed the money in court to be paid out to them on their declaring themselves to be trustees of the mortgage for themselves other than and except the tenant for life: (*Re Harrop's Settled Estate*, 48 L. T. Rep. N. S. 937; 24 Ch. Div. 717; 53 L. J. 574, Ch.)

Money was paid out to trustees in *Re Bolton Estates Act*, 1863 (52 L. T. Rep. N. S. 728; W. N. 1885, p. 90), and in *Re Rathmines Drainage Act* (15 L. Rep. Ir. 576). In the former case the court declined to direct the trustees to give notice of intended investments to the tenant in tail in remainder, but advised that some such notice should be given.

But see notes to sect. 21, sub-sect. ix., *ante*, p. 202.

Sect. 33 gives the same power to trustees, if the money is in their hands, at the option of tenant for life. (*a*)

As to money held by trustees on trust to invest in land, see *Re Mackenzie's Trusts* (p. 189 above) and *Re Maberley*, 33 Ch. Div. 455, *ante*, p. 201), where the testator had directed money to be invested in Irish land, and the court directed the trustees not to comply with this direction. Where trustees had been ordered to invest the produce of land sold under the Settled Estates Act, 1877, in Consols, it was held they could convert them into Preference Railway Stock: (*Re Tennant*, 40 Ch. Div. 594; 60 L. T. Rep. N. S. 489; 37 W. R. 542.)

Where the infant is a minor, the "trustees of the settlement" can exercise the option of investment or application of capital money: (per Pearson, J. in *Re Duke of Newcastle*, 48 L. T. Rep. N. S. 779, 783; 24 Ch. Div. 129, 140; 52 L. J. 645, Ch.; 31 W. R. 782.)

Sect. 34. Where capital money arising under this Act is purchase money paid in respect of a lease for years, or life, or years determinable on life, or in respect of any other estate or interest in land less than the fee simple, or in respect of a reversion dependent on any such lease, estate, or interest, the trustees of the settlement or the court, as the case may be, and in the case of the court on the application of any party interested in that money,

Application of
money paid
for lease or
reversion.

(a) Except where otherwise stated only a *summary* of each section is given.

may, notwithstanding anything in this Act, require and cause the same to be laid out, invested, accumulated, and paid in such manner as, in the judgment of the trustees or of the court, as the case may be, will give to the parties interested in that money the like benefit therefrom as they might lawfully have had from the lease, estate, interest, or reversion in respect whereof the money was paid, or as near thereto as may be. (a)

Mode of
application.

The application to the court under this section will be by Originating Summons; but see sect. 46 (3), *post*, p. 220, and r. 2, *post*, p. 235.

As to service, see rr. 4, 5, p. 235.

For form of summons, see Form XVIII., *post*, p. 248.

This section and sect. 74 of the L. C. C. Act, 1845, are similar enactments, so that where the facts are similar, decisions on sect. 74 are authorities on this section. See *Cottrell v. Cottrell* (52 L. T. Rep. N. S. 486; 28 Ch. Div. 628; 54 L. J. 417, Ch.; 33 W. R. 361), and cases there cited.

In *Re Griffith's Will* (49 L. T. Rep. N. S. 161) under the circumstances the tenant for life, who had arranged with the lessees that they should continue to pay the same rent as before, was held not entitled to any immediate benefit from compulsory purchase of land subject to beneficial leases.

Cutting and
sale of timber,
and part of
proceeds to be
set aside.

Sect. 35. (1.) Where a tenant for life is impeachable for waste in respect of timber, and there is on the settled land timber ripe and fit for cutting, the tenant for life, on obtaining the consent of the trustees of the settlement or an order of the court, may cut and sell that timber, or any part thereof.

(2.) Three fourth parts of the net proceeds of the sale shall be set aside as and be capital money arising under this Act, and the other fourth part shall go as rents and profits. (a)

The application to the court under this section will be by Originating Summons; but see sect. 46 (3), *post*, p. 220, and r. 2, *post*, p. 235.

As to service, see rr. 4, 5, p. 235.

For form of summons, see Forms VI., VII., *post*, p. 243.

For form of summons under sect. 22, by purchaser for payment into court of purchase money of timber, see Form IX., p. 244.

Where tenant for life had power to sell certain timber, but sold the estate, with the timber to be taken at a valuation, it was held that he was not entitled to any part of the purchase money of the timber: (*Re Llewellyn*; *Llewellyn v. Williams*, 58 L. T. Rep. N. S. 152; 37 Ch. Div. 317; 36 W. R. 347).

Sect. 36. The court may, if it thinks fit, approve of any action, defence, petition to Parliament, parliamentary opposition, or other proceeding taken or proposed to be taken for protection of settled land, or of any action or proceeding taken or proposed to be taken for recovery of land being or alleged to be subject to a settlement, and may direct that any costs, charges, or expenses incurred or to be incurred in relation thereto, or any part thereof, be paid out of property subject to the settlement. (*a*)

Proceedings
for protection
or recovery of
land settled
or claimed as
settled.

Application to the court for approval under this section will be by Originating Summons; but see sect. 46 (3), *post*, p. 220; and r. 2, *post*, p. 235.

For an instance of such a summons, see *Re Earl of Aylesford's S. E.* (54 L. T. Rep. N. S. 414; 32 Ch. Div. 162; 55 L. J. 523, Ch.; 34 W. R. 410).

Sect. 37. (1.) Where personal chattels are settled on Heirlooms. trust so as to devolve with land until a tenant in tail by purchase is born or attains the age of twenty-one years, or so as otherwise to vest in some person becoming entitled to an estate of freehold of inheritance in the land, a tenant for life of the land may sell the chattels or any of them.

(2.) The money arising by the sale shall be capital money arising under this Act, and shall be paid, invested, or applied and otherwise dealt with in like manner in all

(*a*) This section is set out *verbatim*.

respects as by this Act directed with respect to other capital money arising under this Act, or may be invested in the purchase of other chattels, of the same or any other nature, which, when purchased, shall be settled and held on the same trusts, and shall devolve in the same manner as the chattels sold.

(3.) A sale or purchase of chattels under this section shall not be made without an order of the court. (a)

For practice under this section, see note to sect. 35, p. 212, *ante*.

Sale of heirlooms was sanctioned in the following cases:—

Re Lord John Thynne's Settlement (77 L. T. 195, July 5, 1884); Sevres vases, value 800*l.*; *Brown's Will*, noted under sect. 15, p. 195 above (51 L. T. Rep. N. S. 157; 27 Ch. Div. 179); *Re Houghton* (or *Cholmondeley's Estate*) (53 L. T. Rep. N. S. 196; 30 Ch. Div. 102; 55 L. J. 37, Ch.; 33 W. R. 869), paintings and tapestry specified in a schedule; *Re Duke of Marlborough* (32 Ch. Div. 1; 54 L. T. Rep. N. S. 914; 55 L. J. 339, Ch.; 34 W. R. 377, C. A.), pictures from Blenheim Gallery; *Re Sir J. Rivett Carnac's Will* (53 L. T. Rep. N. S. 81; 30 Ch. Div. 136; 54 L. J. 1074, Ch.; 33 W. R. 837); an expensive, useless service of plate annexed to a dignity or title of honour.

The court refused to sanction a sale of heirlooms in *Re Beaumont's S. E.* (58 L. T. Rep. N. S. 916), for the following reasons:—

(a.) The chattels had been in the family for a century, and were a feature and characteristic of the house;

(b.) The testator, who settled them, knew the position of the estate, and there had been only slight diminution of rents.

(c.) The sum produced would be small.

(d.) The family objected.

The tenant for life had to pay the costs of the application.

Money derived from sale of heirlooms may be spent on improvements (*Re Houghton, ubi sup.*), or in discharge of incumbrances, without keeping them on foot for the benefit of the infant remainderman in whom the heirlooms would have vested on his attaining twenty-one: (*Re Duke of Marlborough, ubi sup.*)

Trustees with power of sale over land are trustees for sale of heirlooms if it is necessary to have such trustees: (*Constable v. Constable*, 54 L. T. Rep. N. S. 608; 32 Ch. Div. 233, 238; 55 L. J. 491, Ch.; 34 W. R. 470.)

(a) This section is set out *verbatim*.

In *Re Brown* (*ubi sup.*) the tenant for life had had liberty to bid.

X. Trustees.

Sect. 38. (1.) If at any time there are no trustees of a settlement within the definition in this Act, or where in any other case it is expedient, for purposes of this Act, that new trustees of a settlement be appointed, the court may, if it thinks fit, on the application of the tenant for life or of any other person having, under the settlement, an estate or interest in the settled land, in possession, remainder, or otherwise, or, in the case of an infant, of his testamentary or other guardian, or next friend, appoint fit persons to be trustees under the settlement for purposes of this Act.

Appointment
of trustees by
court.

(2.) The persons so appointed, and the survivors and survivor of them, while continuing to be trustees or trustee, and, until the appointment of new trustees, the personal representatives or representative for the time being of the last surviving or continuing trustee, shall for purposes of this Act become and be the trustees or trustee of the settlement. (*a*)

Applications under this section will be made to the court by Originating Summons; but see sect. 46 (3), *post*, p. 220; and rule 2, *post*, p. 235.

If the application is made by the tenant for life notice must be served on the trustees (if any). As to service generally, see rules 4-6, *post*, p. 235.

For Form of Summons, see Form XIX., p. 248, and authors' Forms in Appendix III., *post*.

As to the appointment of new trustees generally, see Chapter X., *ante*, p. 121.

Even before the new rules of December, 1888 (Order LV., r. 13 *a*, *ante*, p. 121), "trustees of the settlement" were almost invariably appointed on summons.

A petition was presented in *Re Harrop* (48 L.T. Rep. N.S. 937; 24 Ch. Div. 719; 53 L. J. 574, Ch.); and in *Re Wright* (24 Ch. Div.

(*a*) This section is set out *verbatim*.

662; 53 L. J. 139. Ch.); but in both cases payment out was ordered of sums above 1000l.

The summons must be entitled "In the matter of the estate," &c. "And in the matter of the Settled Land Act, 1882," and (where applicable) "In the matter of the Settled Land Act, 1884." See *post*, p. 239.

In *Re Wilcock* (56 L. T. Rep. N. S. 629; 34 Ch. Div. 508; 56 L. J. 757, Ch.; 35 W. R. 450), the summons was entitled "In the matter of both Acts."

If a suit is pending for the administration of the trust, apparently it is unnecessary to entitle the summons in the matter of the suit, at all events where the tenant for life has been let into possession: (*Re Parry*, W. N. 1884, p. 43.)

Whom
appointed.

In appointing trustees the court will be careful to protect the interests of the remainderman. It will not appoint a tenant for life, nor a person who may become tenant for life of the settled property (*Re Harrop's S. E.*, 48 L. T. Rep. N. S. 937; 24 Ch. Div. 719; 53 L. J. 574, Ch.), nor the solicitor of the tenant for life, although he is already a trustee of the will or settlement (*Kemps S. E.*, 49 L. T. Rep. N. S. 196; 24 Ch. Div. 485; 52 L. J. 950, Ch.; 31 W. R. 90, C. A.; *Wheelwright v. Walker*, No. 2 (48 L. T. Rep. N. S. 632; 23 Ch. Div. 763; 52 L. J. 274, Ch.; 31 W. R. 716); and although there is no opposition, *Re Kemp* (*ubi sup.*), and *Re Haden's S. E.* (75 L. T., June 23, 1883, p. 142), but the case might possibly be otherwise if there was anything in the will in respect of which it was the trustee's duty to act as a check upon the tenant for life: (see remarks of Cotton, L.J. in *Re Kemp*.)

In *Burke v. Gore* (13 L. Rep. Ir. 367) the court refused to appoint trustees.

A near relation of the tenant for life is objectionable.

In an exceptional case the court might appoint a person beneficially interested: (*Tempest v. Lord Camoys*, 58 L. T. Rep. N. S. 221; 52 J. P. 532; W. N., 1888, p. 17; which was not a case under the Settled Land Act.) See also remarks of Jessel, M.R. in *Forster v. Abrahams* (17 Eq. 356).

In *Re Samuel Smith; Ex parte London and North-Western Railway and Midland Railway Company* (60 L. T. Rep. N. S. 77; W. N., Dec. 1, 1888, p. 220; 58 L. J. 108, Ch., C. A.). A member of a firm of solicitors who acted as solicitors to the trust, was appointed trustee for the purposes of the Settled Land Act, he being already a trustee of the will.

The court will not in general appoint two persons who are near relatives to each other: (*Re Knowles, S. E.*, 51 L. T. Rep. N. S. 655; 27 Ch. Div. 707; 54 L. J. 264, Ch.; 33 W. R. 364.)

As to remitting purchase moneys to executors abroad see *Re Lloyd*; *Edwards v. Lloyd* (54 L. T. Rep. N. S. 643; W. N. 1886, p. 37).

Where persons are appointed to exercise the powers of the Act on behalf of an infant under sect. 60, it is not necessary that "trustees of the settlement" should be appointed (see *Re Countess of Dudley* noted under sect. 60), but the appointment of them obviates the necessity of paying the purchase money into court.

In *Re Wells* (48 L. T. Rep. N. S. 859; 31 W. R. 363; W. N. 1883, p. 111) the mother of infants absolutely entitled, and their brother were appointed "trustees of settlement," and authorised to exercise leasing powers.

See also *Leighton v. Price*, cited at p. 229 below, under sect. 60, where infants being entitled "trustees of settlement" were appointed and were authorised to exercise the powers of the Act on behalf of the infants.

See further notes to sects. 58, 60, *post*, pp. 227, 229.

The Board of Inland Revenue have intimated their opinion that "original appointments of trustees, as distinguished from those of new trustees, are not chargeable with duty." See Sol. Jour., April 6, 1889, p. 366, and see *Re Potter* (W. N. 1889, p. 69), and *Re Kennaway* (W. N. 1889, p. 70, and 86 L. T. 229).

"Trustees of the settlement" appointed by the court have power to give receipts for purchase money: (*Cookes v. Cookes*, 56 L. T. Rep. N. S. 160; 34 Ch. Div. 498, 502; 56 L. J. 397, Ch. 35 W. R. 402.)

Money paid into court under the L. C. C. Act, 1845, may be paid out to them (*Re Harrop's Trusts*, *ubi sup*; *Re Wright's Trusts*, 24 Ch. Div. 662; 53 L. J. 139, Ch.; *Re Duke of Rutland's Settlement*, 49 L. T. Rep. N. S. 196; 31 W. R. 947); but not money paid into court at the option of tenant for life, see *Cookes v. Cookes*, (*ubi sup*.) and sect. 22 (1).

It is doubtful whether C. A., 1881, s. 31, applies to trustees appointed under S. L. A., 1882, s. 38, so as to enable a continuing trustee to appoint a new trustee: (*Re Wilcock*, 56 L. T. Rep. N. S. 629; 34 Ch. Div. 508; 56 L. J. 757, Ch.; 35 W. R. 450; *Re Kane's Trusts*, 21 L. Rep. Ir. 112.)

Sect. 39. (1.) Capital money shall not be paid to one trustee unless settlement otherwise order. (2.) In other

(a) Except where otherwise stated only a *summary* of each section is given.

respects the provisions of the Act as to trustees apply to a surviving trustee. (a)

A surviving trustee who had power to act and to receive and give receipts for capital given to him by the settlement, was held to come within the exceptions of sects. 39 (1) and 45 (2), so as to be able to receive notices and capital money: (*Re Garnett, Orme and Hargreaves Contract*, 49 L. T. Rep. N. S. 655; 25 Ch. Div. 595, 599; 53 L. J. 196, Ch.; 32 W. R. 313.)

Receipts.

Sect. 40. The receipt of trustees of settlement, or where one is empowered to act of one trustee, or of personal representative of last surviving or continuing trustee, shall be a good discharge.

Sect. 41. Each trustee of settlement is answerable for his own acts and defaults only.

Indemnity.

Sect. 42. Trustees not liable for giving any consent under the Act, or for not taking any steps to prevent anything; they may adopt contracts of tenant for life without inquiry; they must, however, see that the conveyance purports to convey the land properly.

The power to give receipts contained in sect. 40 extends to trustees appointed by the court under sect. 38; (*Cookes v. Cookes*, 34 Ch. Div. 498, *ante*, p. 217.)

The trustees are not under any duty to come to the court to restrain a sale, &c., (sect. 42), unless there is an actual case of complicity in an improper sale by a tenant for life (*Hatten v. Russell*, 38 Ch. Div. 334, *ante*, p. 210) or perhaps if the land were sold so "infinitely" below its real value, that the sale amounted to a fraud: (*Wheelwright v. Walker*, 23 Ch. Div. 762, *ante*, p. 191.

Sect. 43. Trustees of settlement may reimburse themselves out of the trust property.

(See *Re Llewellyn*, W. N. 1887, p. 255.)

Reference of
differences to
court.

Sect. 44. If at any time a difference arises between a tenant for life and the trustees of the settlement, respecting the exercise of any of the powers of this Act, or respecting any matter relating thereto, the court

(a) Except where otherwise stated only a *summary* of each section is given.

may, on the application of either party, give such directions respecting the matter in difference, and respecting the costs of the application, as the court thinks fit. (a)

Applications under the section will be made to the court by Mode of Originating Summons, but see sect. 46 (3) *post*, 220, and r. 2, *post*, application. p. 235.

As to service see r. 4, 5, *post*, p. 235.

For form of summons see Form XX., p. 249.

Some instances of references under this section are :—*Cartington Estate*, see p. 223, and *Mackenzie's Trusts*, see p. 223; and see *Hatten v. Russell*, *sup.*)

Sect. 45. (1) Tenant for life intending to make a sale, lease, &c., shall give notice to each trustee of settlement by registered letter addressed to his usual or last known place of abode in the United Kingdom, and shall give like notice to trustees' solicitor, if known to tenant for life, every such letter being posted not less than one month before making of such sale, &c., or of contract for same. (2.) But at date of notice the trustees shall not be less than two, unless contrary intention expressed in settlement. (3.) A person dealing in good faith with tenant for life is not concerned to inquire as to giving of such notice. (b)

Notice of intended sale, &c.

It is conceived that a general notice is insufficient for a mortgage or charge (*Ray's Settled Estates*, 50 L. T. Rep. N. S. 80; 25 Ch. Div. 464; 53 L. J. 205, Ch.; 32 W. R. 458), although it will now suffice for a sale, exchange, partition, or lease (S. L. A. 1884, s. 5 (1), and notice may be waived by the trustee: (*Ib.*, subsect. 3.)

It is clear that the tenant for life cannot *complete* a sale unless there are trustees of the settlement to whom the notice must be given (or by whom it may be waived) and to whom the purchase money may be paid. For unless there are trustees he cannot direct the purchase money to be paid into court: (*Hatten v. Russell*, 58 L. T. Rep. N. S. 271; 38 Ch. Div. 334, 345; 57 L. J. 425, Ch.; 36 W. R. 317.) But although there is an insufficient notice given

(a) This section is set forth *verbatim*.

(b) Except where otherwise stated only a *summary* of each section is given.

before the *contract* for sale (*Duke of Marlborough v. Sartoris*, 55 L. T. Rep. N. S. 506; 32 Ch. Div. 616) or even where no notice at all, before the contract is given, because there are no trustees (*Hatten v. Russell*, *sup.*); yet the purchaser is bound to complete where there are trustees before the day fixed for completion, and notice of the *sale* has been given to them under this section, or has been waived. See cases last cited.

Quere, as to effect if purchaser knew that no notice had been given: (see *Hatten v. Russell*, and compare sect. 54.)

In *Wheelwright v. Walker*, 48 L. T. Rep. N. S. 70; 23 Ch. Div. 752, 763; 52 L. J. 274, Ch.; 31 W. R. 363) an injunction was obtained to prevent a tenant for life from selling land or offering it for sale until trustees were appointed.

XI. Procedure, &c.

Court appli-
cations, &c.

Sect. 46. (1.) All matters under this Act are assigned to Chancery Division; (2) payment into court exonerates; (3) applications to court are to be by petition or summons; (4) on application by trustees notice shall be served on tenant for life; (5) notice shall be served on such persons as court thinks fit; (6-10) court has full discretion as to costs. Powers of court may, as to land in County Palatine of Lancaster, be exercised also by Court of Chancery of County Palatine. Powers of court may, as to land not exceeding in value 500*l.*, or in annual rateable value 30*l.*, and as to capital money not exceeding 500*l.*, and as to settled personal chattels not exceeding in value 500*l.*, be exercised by any County Court where land to be dealt with is situated, or from which the capital money arises, or in connection with which the personal chattels are settled. (*a*)

Sect. 47. Where court orders costs to be paid out of settled property same may be paid out of capital or income, or in any other mode court may think fit.

Costs.

The usual order on a properly conducted summons which succeeds is that costs of all parties (including those directed by the court to be served) (*Re Houghton*, 53 L. T. Rep. N. S. 196; 30 Ch. Div.

(*a*) Except where otherwise stated only a *summary* of each section is given.

102, 105; 55 L. J. 37, Ch.; 33 W. R. 869; *Re James*, 51 L. T. Rep. N. S. 596; 32 W. R. 898), shall be paid as between solicitor and client out of the settled property, or the proceeds of the sale: (see Forms III., IV., &c., *post*, p. 241).

Costs of the trustee's appeal were allowed in *Re Jones*, 50 L. T. Rep. N. S. 466; 26 Ch. Div. 736) although he was defeated in both courts.

Even when the application fails costs may be ordered to be paid out of the estate: (*Re Horne*, 59 L. T. Rep. N. S. 580; 39 Ch. Div. 84, 90).

In *Constable v. Constable* (54 L. T. Rep. N. S. 608; 32 Ch. Div. 233; 55 L. J. 491, Ch.; 34 W. R. 470), where the summons was taken out in an action, and no other order was made, costs were made costs in the action.

The tenant for life had to pay costs of an unsuccessful application in *Re Beaumont's S. E.* (58 L. T. Rep. N. S. 916), noted under sect. 37 above. In *Sebright v. Thornton* (W. N., 1885, p. 176), where an action was brought, he was only allowed "party and party" costs.

Incidental costs may be allowed, see *Re Llewellyn* (37 Ch. Div. 317; 58 L. T. Rep. N. S. 152). Trustees appearing by the same counsel as the tenant for life were disallowed their costs out of the estate in *Re The Broadwater Estate* (53 L. T. Rep. N. S. 745, C. A.) noted under sect. 26, p. 207, above.

Tenant for life (appellant) had to pay costs of trustees and remaindermen (respondents) on appeal in *Re Strangways* (55 L. T. Rep. N. S. 714; 34 Ch. Div. 423, 433; 56 L. J. 195, Ch.; 35 W. R. 83, C. A.).

For various references in Act, rules, and forms, to costs, see note to rule 15, *post*, p. 238.

As to costs generally, see p. 158, *ante*.

Sect. 47 directs the mode in which money shall be raised for costs, &c., to be paid out of the settled property. (a)

Sect. 48 directs that the commissioners heretofore styled "Inclosure," "Copyhold," and "Tithe" shall be styled "Land Commissioners for England," and shall have one seal, but shall have all the powers they previously possessed. They shall also, for the purposes of

Land Com-
missioners.

(a) Except where otherwise stated only a summary of each section is given.

any past or future Act providing for improvements on settled land, have the powers they have under the Improvement of Land Act, 1864. (a)

Sect. 49. Their certificates and reports made under this Act shall be filed at their office, and office copies shall be "sufficient" evidence.

XII. *Restrictions, Savings, &c.*

Powers in-
destructible.

Sect. 50. The powers given by this Act to a tenant for life cannot be assigned or released, and do not pass to an assignee of his estate, but remain exercisable by the tenant for life, and any contract by him not to exercise them is void; but this section is without prejudice to the rights of an assignee, for value, of tenant for life's estate, so that assignee's rights cannot be affected without his consent, except that tenant for life in actual possession may make leases at the best rent, without fine, and otherwise in accordance with the Act, without such consent. This section extends to past and future assignments, total or partial, and assignment includes incumbrance, &c.

A covenant with trustees who held on trust for sale, that beneficiaries would not claim to have the property in *lieu* of the proceeds of the sale, was held not to prevent them selling as tenants for life; there being no one to enforce the covenant, and they being able, if the estate was sold, to outbid other purchasers, and buy it back: (*Re Hale and Smyth (or Clark's) Contract*, 55 L. T. Rep. N. S. 151; 55 L. J. 550, Ch.; 34 W. R. 624; W. N. 1885, p. 65.)

Bankruptcy of the tenant for life does not suspend his powers under this Act: (*Manse's Settled Estates*, W. N. 1884, p. 209. See further remarks of North, J., in *Re Sebright's S. E.*, 55 L. T. Rep. N. S. 354, 358; 33 Ch. Div. 429, 441). Although a trustee in bankruptcy is not an assignee for value, it must not be lightly assumed that a bankrupt tenant for life can exercise the powers of the Act without the consent of such trustee.

(a) Except where otherwise stated only a summary of each section is given.

Sect. 51. A prohibition or limitation in a "settlement" (see definition—sect. 2) attempting to deprive tenant for life of any of the powers conferred by this Act is absolutely void. Special provision is made with regard to estates given *until* tenant for life sells, &c. (a) Prohibitions void.

Conditions as to residence cannot prevent sale (*Re Paget's S. E.*, 51 L. T. Rep. N. S. 90; 30 Ch. Div. 161; 55 L. J. 42, Ch.; 33 W. R. 898); or letting (*Re Thompson*, 21 L. Rep. Ir., *supra*, p. 195), but a forfeiture may still accrue if tenant for life breaks condition of residence before the property is disposed of: (*Re Haynes; Kemp v. Haynes* (58 L. T. Rep. N. S. 14; 37 Ch. Div. 306; 57 L. J. 519, Ch.; 36 W. R. 321).

So a direction in a Private Act not to sell lands until certain events (*Re Chaytor's S. E.*, 50 L. T. Rep. N. S. 88; 25 Ch. Div. 651; 53 L. J. 312, Ch.; 32 W. R. 517); and a direction that investment until purchase of land should be in Government securities only has been held inoperative: (*Re Mackenzie's Trusts*, 48 L. T. Rep. N. S. 936; 23 Ch. Div. 750.)

But the section does not apply except there is in the settlement a limitation which, but for the attempted prohibition, would constitute a statutory tenant for life: (*Re Atkinson; Atkinson v. Bruce*, 54 L. T. Rep. N. S. 403; 31 Ch. Div. 581; 34 W. R. 445, C. A.; *Re Hazle*, 52 L. T. Rep. N. S. 947; 29 Ch. Div. 78, 84; 54 L. J. 628, Ch.; 33 W. R. 759, C. A.).

Sect. 52. No forfeiture shall be occasioned by exercise of any of the statutory powers.

Sect. 53. In exercising powers tenant for life is bound to regard the interest of all parties entitled under the settlement, and is to be deemed a trustee for those parties. Tenant for life a trustee.

He has rights somewhat resembling those of a trustee as to costs (*Cartington Estate*, 49 L. T. Rep. N. S. 95; 24 Ch. Div. 608; 52 L. J. 815, Ch.; 31 W. R. 910) but, *semble*, he is not absolutely entitled under this section to his costs, charges, and expenses properly incurred, see *Llewellyn v. Williams* (58 L. T. Rep. N. S. 152; 37 Ch. Div. 317-325. He must consider the interests of all parties. He may exercise a discretion, although he gets a benefit,

(a) Except where otherwise stated only a summary of each section is given.

and may require capital money to be spent in paying off incumbrances or improving the estate (*Re Duke of Marlborough*, 54 L. T. Rep. N. S. 914; 32 Ch. Div. 1; 56 L. J. 70, Ch.; 35 W. R. 55, C. A.) and may cause improvements to be paid for out of capital money, although there is a power so to apply income: (*Clarke v. Thornton*, 56 L. T. Rep. N. S. 294; 35 Ch. Div. 307, 311; 56 L. J. 302, Ch.; 35 W. R. 603; *Re Lord Stamford's Estate*, 56 L. T. Rep. N. S. 484.) See also pp. 191, 192 above, and *Re Cardigan v. Curzon Howe*, noted under sect. 21 (X.), p. 202 above.

Protection of
purchasers.

Sect. 54. Purchasers, lessees, &c., "dealing in good faith with a tenant for life, shall, as against all parties entitled under the settlement, be conclusively taken" to have given the best price, &c., and to have complied with all the requisitions of the Act. Compare sect. 45 (3). (a)

Sect. 55. Powers of sale, &c., may be exercised from time to time. All proper assurances may be made to carry out the sales, &c., empowered. Provisions in the Act referring to sales, &c., refer to sales, &c., under this Act.

Saving for
other powers.

Sect. 56. (1.) Nothing in this Act shall take away, abridge, or prejudicially affect any power for the time being subsisting under a settlement, or by statute or otherwise, exercisable by a tenant for life, or by trustees with his consent, or on his request, or by his direction, or otherwise; and the powers given by this Act are cumulative.

(2.) But, in case of conflict between the provisions of a settlement and the provisions of this Act, relative to any matter in respect whereof the tenant for life exercises or contracts, or intends to exercise any power under this Act, the provisions of this Act shall prevail; and, accordingly, notwithstanding anything in the settlement, the consent of the tenant for life shall, by virtue of this Act, be necessary to the exercise by the trustees of

(a) Except where otherwise stated only a summary of each section is given.

the settlement or other person of any power conferred by the settlement exercisable for any purpose provided for in this Act.

(3.) If a question arises, or a doubt is entertained, respecting any matter within this section, the court may, on the application of the trustees of the settlement, or of the tenant for life, or of any other person interested, give its decision, opinion, advice, or direction thereon. (a)

Sub-sect (2) of sect. 56 is modified by S. L. A., 1884, s. 6, so that now, in cases falling within S. L. A., s. 63, any consent not required by the terms of the settlement is not necessary to enable the trustees or any other person to execute any of the trusts or powers created by the settlement (sub-sect. 1); and in case of settlements not falling within sect. 63, where two or more persons constitute the tenant for life, the consent of only one of them is necessary (sub-sect. 2). This enables trustees under a *trust* for sale to sell as before the S. L. A. (unless an order of the court is made under S. L. A., 1884, s. 7), and removes a very serious difficulty which had been raised in *Re Earle and Webster* (48 L. T. Rep. N. S. 962; 24 Ch. Div. 144; 52 L. J. 828, Ch.; 31 W. R. 837) and *Taylor v. Poncia* (50 L. T. Rep. N. S. 20; 25 Ch. Div. 646; 53 L. J. 409, Ch.; 32 W. R. 335). In both these cases the court held, a good title could be made without the beneficiaries, but on special grounds.

Power of sale in S. L. A. overrides restrictions of private Act: (*Re Chaytor's S. E.*, 50 L. T. Rep. N. S. 88; 25 Ch. Div. 651; 53 L. J. 312, Ch.; 32 W. R. 517.) As to order for sale made before the S. L. A., under the Settled Estates Act, 1887, see *Barr Haden's S. E.* (49 L. T. Rep. N. S. 661; 32 W. R. 194; W. N. 1883, p. 188.)

As to special powers under the Settled Estates Act, 1877, see *Poole's Settlement* (50 L. T. Rep. N. S. 585; 32 W. R. 956).

For other cases on S. L. A. 1882, s. 56, see *Mackenzie's Trusts*. (48 L. T. Rep. N. S. 936; 23 Ch. Div. 750; 52 L. J. 526, Ch.; 31 W. R. 948); *The Duke of Newcastle (Infant)* (48 L. T. Rep. N. S. 779; 24 Ch. Div. 129; 52 L. J. 645, Ch.; 31 W. R. 782); *Re Clitheroe* (53 L. T. Rep. N. S. 733; 31 Ch. Div. 135; 55 L. J. 107, Ch.; 34 W. R. 169).

(a) This section is set out *verbatim*.

In *Taylor v. Poncia*, Mr. Justice Pearson expressed an opinion that even if consents of tenants for life were necessary, the order of the court would override that, and the purchaser would be safe.

Applications to the court under sub-sect. (3) of this section will be made by Originating Summons: but see sect. 46 (3) *ante*, p. 220, and rule 2, *post*, p. 235.

A petition was presented in *Re Clitheroe*, 52 L. T. Rep. N. S. 294; 28 Ch. Div. 378, on appeal; 53 L. T. Rep. N. S. 733; 31 Ch. Div. 135.

As to service, see rr. 4, 5, *post*, p. 235.

For form of summons, see Form XXI., *post*, p. 249.

Additional or
larger powers
by settlement.

Sect. 57. Settlement may give additional or larger powers which will (unless a contrary intention be expressed) be exerciseable like the statutory powers. (a)

XIII. Limited Owners Generally.

Statutory
tenants for
life.

Sect. 58. The following persons when in possession have the powers of a tenant for life under this Act, namely, (1) a tenant in tail, including a tenant in tail by Act of Parliament restrained from barring the same, and though reversion in Crown, but not such a tenant where the land was purchased with money provided by Parliament in consideration of public services; (2) a tenant in fee simple with an executory gift over; (3) a person entitled to a base fee, though reversion is in Crown; (4) a tenant for years determinable on life not holding merely under a lease at a rent; (5) a tenant for life of another, not holding merely under a lease at a rent; (6) a tenant for his own or any other life, or for years, determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of estate or otherwise, or to be defeated by an executory gift over, or is subject to a trust for accumulation of income; (7) a tenant in tail after possibility of issue extinct; (8) a

(a) Except where otherwise stated only a summary of each section is given.

tenant by the curtesy (*a*) ; (9) a person entitled to the income of land under a trust for payment to him for life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other event. (*b*)

In *Re Bolton Estates Act*, 1863 (52 L. T. Rep. N. S. 728), money representing settled land vested in a tenant in tail restrained by statute from alienation, was ordered to be paid out to trustees appointed for the purposes of the S. L. A. 1882, 1884.

Where estates were devised to trustees on trust to pay the testator's widow, the income for maintenance, &c. of the testator's son till twenty-one, without liability to account, and on his attaining twenty-one, for him absolutely, but if he died under twenty-one on other trusts, it was held under sub-sects. (i.) (ii.) that the infant had powers of tenant for life : (*Re Morgan*, 48 L. T. Rep. N. S. 964 ; 24 Ch. Div. 114 ; 53 L. J. 85, Ch. ; 31 W. R. 948.) So where infant children took a vested (absolute) interest liable to be divested, it was held they had the statutory powers : (*Re James*, 51 L. T. Rep. N. S. 596 ; 32 W. R. 898 ; W. N. 1884, p. 172 ; 19 L. J. 92, N. C.)

The following persons have been held to have the powers of tenant for life :—

(1.) A person entitled to income only subject to prior term of 2000 years, though the trustees were directed to enter into possession and manage pay. charges. &c., and there was no income left : (*Re Jones*, 50 L. T. Rep. N. S. 466 ; 26 Ch. Div. 736 ; 53 L. J. 807, Ch. ; 32 W. R. 735, C. A.)

(2.) Where the life tenant was subject to a prior term with trust for accumulation to pay annuities, portions, &c., so that he would necessarily receive nothing for fifteen or twenty years, except as an annuitant : (*Re Clitheroe Estate (Duke of Buccleuch)* 53 L. T. Rep. N. S. 733 ; 31 Ch. Div. 135, C. A., see p. 225 *supra*.)

(3.) Persons holding terminable or conditional life estates : (see *Re Parry*, W. N. 1884, p. 43 : *Re Paget's S. E.*, 51 L. T. Rep. N. S. 90 ; 30 Ch. Div. 161 ; 55 L. J. 42, Ch. ; 33 W. R. 898.)

In the following cases persons were held not to have the powers of a tenant for life :—

(1.) Where a testator's widow was entitled to the rents during the continuance of a lease and to an annuity afterwards : (*Re Hazle's*

(*a*) By Settled Land Act, 1884, sect. 8, for purposes of the S. L. Act, 1882, the estate of a tenant by the curtesy is to be deemed an estate arising under a settlement made by his wife.

(*b*) Except where otherwise stated only a summary of each section is given.

S. E., 53 L. T. Rep. N. S. 947; 29 Ch. Div. 78; 54 L. J. 628, Ch.; 33 W. R. 759, C.A.)

(2.) Money representing settled land vested in tenant in tail restrained by statute from alienation was ordered to be paid out to trustees appointed for the purpose of the *S. L. A.*, 1882-1884: (*Re The Bolton Estate Act*, 1863, 52 L. T. Rep. N. S. 728.)

(3.) Where there was a trust for the life of A. to apply rents of an estate for the benefit of A., his wife and children, if any: (*Re Atkinson*; *Atkinson v. Bruce*, 54 L. T. Rep. N. S. 403; 31 Ch. Div. 577; 34 W. R. 445.)

(4.) When the life estate was preceded by a trust for accumulation for twenty years: (*Re Strangways*; *Hickley v. Strangways*, 55 L. T. Rep. N. S. 714; 34 Ch. Div. 423, C.A.)

(5.) Where there was devise in trust for sale, with direction that sale should not take place for twenty-one years from date of will, though the estate was to be held as personalty for purposes of transmission, rents to go as income and capital held in trust for sons attaining twenty-five, and daughters attaining that age or marrying. The will contained powers of maintenance and accumulation: (*Re Horne's S. E.*, 59 L. T. Rep. N. S. 580; 39 Ch. Div. 84.)

Infants.

XIV. *Infants; Married Women; Lunatics.*

Sect. 59. Where a person, who is in his own right seized of or entitled in possession to land, is an infant, then for purposes of this Act the land is settled land, and the infant shall be deemed tenant for life thereof. (a)

Sect. 60. Where a tenant for life, or a person having the powers of a tenant for life under this Act, is an infant, or an infant would, if he were of full age, be a tenant for life, or have the powers of a tenant for life under this Act, the powers of a tenant for life under this Act may be exercised on his behalf by the trustees of the settlement, and if there are none, then by such person and in such manner as the court, on the application of a testamentary or other guardian or next friend of the infant, either generally or in a particular instance, orders.

(a) This section is set out *verbatim*.

Applications to the court under this section will be made by Mode of Originating Summons; but see sect. 46 (3), *ante*, p. 220; and application. rule 2, *post*, p. 235.

As to service, see rules 4, 5, *post*, p. 235.

For Forms of Summons, see Form XXII., p. 249, and authors' Forms, Appendix III., *post*.

Under this section three courses appear to be open, viz., (1) to appoint trustees of the settlement merely; (2) to appoint such trustees, and to authorise them to exercise the powers of the Act on behalf of the infant; and (3) merely to appoint a person to exercise the powers of the Act on behalf of the infant. It is conceived that any one of such courses is sufficient; but it is submitted that (2) is the most convenient. In the case of an infant absolutely entitled there is strictly speaking no settlement, though the land is deemed to be settled land. See Dan. F. p. 1009, note (r.)

For title of summons in such a case, see *post*, Appendix II.

Infants' shares in partnership realty are within these sections. See *Re Wells* (48 L. T. Rep. N. S. 859; 31 W. R. 764; W. N. 83, p. 111, *ante*, p. 189).

Sale of an infant's house out of court was sanctioned in an action, and in application under this Act in *Re Price; Leighton v. Price* (51 L. T. Rep. N. S. 497; 27 Ch. Div. 552; 32 W. R. 1009.)

In both the last-mentioned cases trustees of the settlement were appointed, and they were authorised to exercise the powers of the Act on behalf of the infants.

In *Re Greenville Estate* (11 L. Rep. Ir. Ch. Div. 138), where an infant was entitled to an undivided share of land the Irish Court refused to appoint a co-owner (who was also uncle of the infant) to exercise power of concurring in a sale under the Settled Land Act; but appointed another person.

Where there are no "trustees of the settlement," and persons are appointed to exercise the powers of the Act on behalf of infants, such persons can sell and make a good title without the appointment of trustees under sect. 38; but the order made under sect. 60 ought in that case to direct the purchase money to be paid into court: (*Re Countess of Dudley's Contract*, 57 L. T. Rep. N. S. 10; 35 Ch. Div. 338; 56 L. J. 478, Ch.; 35 W. R. 492.)

The same persons may be appointed trustees, and persons to exercise the powers: (*Re Dudley*.)

Several important points in connection with a settlement, where there was an infant tenant for life, were decided in *Re Duke of Newcastle's Estates* (48 L. T. Rep. N. S. 779; 24 Ch. Div. 129; 52 L. J. 645, Ch.; 31 W. R. 782).

In case of infant tenant in tail in possession, aged eighteen, the court refused to give the trustees general authority to grant

building leases for 200 years, but gave authority, subject to approval of the court, for each lease: (*Cecil v. Langdon*, 54 L. T. Rep. N. S. 418.)

In applications under sect. 60 the court will not as a rule appoint a person to exercise the powers of a tenant for life generally on behalf of an infant, but only with reference to a particular sale or other transaction.

Sect. 61. Where a married woman is tenant for life, or limited owner, for separate use, or is entitled for her separate property, she may act without her husband; otherwise she and her husband can act together as "tenant for life." Restraint on anticipation will not affect the power. (a)

A testator left property to trustees on trust to pay net rents to a married woman for her separate use and out of the rents to repair buildings and the chancel of Pannal Church. Held, on motion for an injunction by the trustees to restrain her from interfering with tenants, &c., made in an administration action, that she was equitable tenant for life, and that under the M. W. P. Act, 1882, she could undertake the repairs; but that as the trustees of the will were not trustees within S. L. A., s. 2 (8) she could not grant leases, &c., till such trustees were appointed. By consent, the trustees of the will were appointed by the judge, and a declaration made that she was entitled as tenant for life upon giving the undertaking as to repairs, and on giving proper notices to the trustees to grant leases: (*Re Bentley*; *Wade v. Wilson*, 54 L. J. 782, Ch.; 33 W. R. 610.)

Sect. 62. Where tenant for life is a lunatic so found, the committee of his estate may by order of Lord Chancellor exercise powers of tenant for life, and such order may be made on petition of any person interested, or such committee.

The committee of a lunatic tenant for life cannot give a valid notice under sect. 45 unless he has previously obtained authority from the Court of Lunacy to do so: (*Ray's S. E.*, 50 L. T. Rep. N. S. 80; 25 Ch. Div. 464; 53 L. J. 409, Ch.; 32 W. R. 335.)

Where the committee of a lunatic petitioned for power to let a house on a repairing lease for ninety-nine years the court directed

(a) Except where otherwise stated only a summary of each section is given.

the petition to stand over until appointment of trustees under sect. 38: (*Re Taylor*, 49 L. T. Rep. N. S. 420; 52 L. J. 728, Ch.; 31 W. R. 596; W. N. 1883, p. 95.) The Court gave leave to the committee of a lunatic tenant in tail to take proceedings under the S. L. A. for the sale of his undivided shares to his co-owner: (*Re Gaitskell, a Lunatic*, 40 Ch. Div. 416; 58 L. J. 262, Ch.)

As to petitions in lunacy, see Lunacy Order, 1883, No. 17.

XV. Settlement by Way of Trusts for Sale.

Sect. 63. (1.) Any land which by virtue of any instrument, whether made before or after commencement of this Act, is subject to a trust or direction for sale and for application of the proceeds or the income of the proceeds, or the income of the land until sale, or any part of that money or income for benefit of any person for life or other limited period, or for benefit of two or more persons concurrently for any limited period, and whether absolutely or subject to restriction, shall be deemed settled land, and the person for time being beneficially entitled to the income of the land until sale shall be deemed tenant for life thereof; or if two or more persons are so entitled concurrently, then those persons shall be deemed to constitute together the tenant for life, and the trustees for sale or having power to consent to sale, or if none, then the persons, if any, who are by the settlement declared trustees for purposes of this Act, are trustees of the settlement. (a)

(2.) In such case the provisions of this Act referring to a tenant for life, &c., shall extend to the persons aforesaid, except that capital money arising from the settled land shall not be applied in purchase of land unless authorised by the settlement, and shall not be considered as land unless same would, if arising under the settlement from sale of the settled land, have been so considered.

(a) Except where otherwise stated only a *summary* of each section is given.

The heading of sect. 63 in S. L. A. is "Settlement by way of trusts for sale," while the marginal note is, "Provision for ease of trust to sell and re-invest in land." Neither heading nor marginal note is accurate. The former is too wide, and the latter too narrow. The section does not comprehend all trusts for sale. It would not include a trust to sell and divide among several persons absolutely, or to sell and pay creditors, and restore the residue to the person creating the trust. But it will be noticed that it is not limited to cases where the trust is for re-investment in land. No such restriction is found in sub-sect. (1), and sub-sect. (2) (ii.) clearly implies that some settlements falling within sect. 63, do not authorise investment of capital money arising from sale in land. To bring a settlement within this section, there must be (1) a trust or direction for sale, and (2) a trust or direction for the application of either (a) the sale money, or (b) the income of the sale money, or (c) the income of the land until sale, or (d) any part of that money or income—for the benefit of any person for life, or any other limited period, or for the benefit of two or more persons concurrently for any limited period. The ordinary "personal" marriage settlement of land on trust for sale, with trust to pay the income of the purchase-money to husband and wife successively, and then to hold the capital for the children, would appear to be an example of a settlement falling within this section; and numerous wills come within its scope.

Amendment
Act.

By S. L. A. 1884 (47 & 48 Viet. c. 18), s. 7 (i.) the powers given by sect. 63 are not to be exercised without the leave of the court. The court *may* by order authorise any person to exercise the powers (sub-sect. ii.), vary, rescind, or make new orders (sub-sect. iii.). Such order suspends certain trusts or powers (sub-sect. iv.), and may be registered as *lis pendens* (sub-sect. v.); and until registration persons dealing with trustees, &c., are protected (sub-sect. vi.).

By S. L. A., 1884, s. 7 (vii.):

An application to the court under this section may be made by the tenant for life, or by the persons who together constitute the tenant for life, within the meaning of section sixty-three of the Act of 1882. (a)

The application will be by Originating Summons, but in *Re Houghton's Estate* (53 L. T. Rep. N. S. 196; 30 Ch. Div. 102, 107; 55 L. J. 37, Ch.; 33 W. R. 869), a petition was presented to

(a) This sub-section is set out *verbatim*.

authorise the tenant for life under a settlement containing a trust for sale to sell heirlooms and invest purchase money on improvements.

It appears that the court directed that infant tenant in tail should be served (30 Ch. Div. 105).

By S. L. A., 1884, s. 7 (viii.).

An application to rescind or vary an order, or to make any new or further order under this section, may be made also by the trustees of the settlement, or by any person beneficially interested under the settlement. (*a*)

Sub-sect. (ix.) of S. L. A., 1884, sect. 7, declares that the person to whom leave is given under that section may exercise the powers of sect. 63, and sub-sect. (x.) protects dealings prior to the Act of 1884 [3rd July, 1884].

The following cases have been decided on, sect. 63 :—

Earle and Webster's Contract (24 Ch. Div. 144), and *Taylor v. Poncia* (25 Ch. Div. 646), noted under sect. 56, p. 225, *ante*; *Re Powell*; *Allaway v. Oakley* (76 L. T., March 22, 1884; W. N. 1884, p. 67), see below; *Re Ridge*; *Hillard v. Moody* (31 Ch. Div. 504), noted under sect. 11, p. 194 above; *Re Horne* (39 Ch. Div. 84), noted under sect. 58, p. 228.

Where a moiety of real estate was held on trust for sale and investment, and to use so much of the annual income as should be required for maintenance and education of testatrix's son and daughter, and to accumulate the remainder, and pay moieties of principal and interest to the son on attaining twenty-one, and the daughter on attaining twenty-one, or marriage; it was held that the son and daughter were tenants for life, so as to enable trustees on their behalf to concur with persons entitled to the other moiety in making mining leases: (*Re Powell*; *Re Allaway*; *Allaway v. Oakley, ubi sup.*) In *Re Horne* there was not in effect an immediate trust for sale, and possibly the children might not be eventually entitled to the surplus accumulated.

XVI. *Repeals.*

Sect 64 repeals enactments in schedule, but with a wide saving as to rights accrued, &c. (*b*)

(*a*) This sub-section is set out *verbatim*.

(*b*) Except where otherwise stated only a *summary* of each section is given.

The schedule repeals the rest of 23 & 24 Viet. c. 145 (Lord Cranworth's Act). Part had been repealed by the Conveyancing Act, 1881. The schedule also repeals a small part of the Improvement of Land Act, 1864, and sect. 17 of the Settled Estates Act, 1877, which section is superseded by sect. 36 of the present Act.

XVII. Ireland.

Sect. 65. Modifications respecting Ireland.

The Civil Bill Courts in Ireland shall have the powers of the Court under this Act, where the property does not exceed in capital value 500*l.*, or in annual value 30*l.*

The Commissioners of Public Works in Ireland shall be substituted for the Land Commissioners.

The term for which a lease other than a building or mining lease may be granted shall be not exceeding thirty-five years. (*a*)

NOTE.—The provisions of the Settled Land Act, 1884, have been noticed among the provisions of the Act of 1882.

RULES AND FORMS.

DECEMBER, 1882.

RULES UNDER THE SETTLED LAND ACT, 1882. (*b*)

1. The expression "the Act" used in these rules means the Settled Land Act, 1882.

Words defined by the Act when used in these rules have the same meanings as in the Act. (*c*)

The expression "the tenant for life" includes the tenant

(*a*) Except where otherwise stated only a *summary* of each section is given.

(*b*) These rules are under sect. 46, page 220. For procedure see also that section.

(*c*) See sect. 2, page 188.

for life as defined by the Act, and any person having the powers of tenant for life under the Act. (a)

2. All applications to the court (b) under the Act may be made by summons (c) in chambers; and if in any case a petition shall be presented without the direction of the judge, no further costs shall be allowed than would be allowed upon a summons.

3. The forms in the appendix (d) to these rules are to be followed as far as possible, with such modification as the circumstances require. All summonses, petitions, affidavits, and other proceedings under the Act are to be entitled according to Form I. in the Appendix.

4. The persons to be served (e) with notice of applications to the court shall, in the first instance, be as follows:

In the case of applications by the tenant for life (f) under sections 15 (g) and 34 (h) the trustees.

In the case of applications under section 38, (i) the trustees (if any), and the tenant for life if not the applicant.

In the case of applications under section 44 (k), the tenant for life, or the trustees as the case may be.

No other person shall in the first instance be served. Except as hereinbefore provided where an application under the Act is made by any person other than the tenant for life, the tenant for life alone shall be served in the first instance.

5. Except in the cases mentioned in the last rule, applications by a tenant for life shall not in the first instance be served on any person.

(a) See sects. 2, 58-63, pages 188, 226, 231. Apparently a person who is "deemed" tenant for life is included.

(b) Sect. 46, page 220.

(c) Sect. 46 (3), page 220.

(d) These will be found after these rules at page 240. Of course, throughout these rules, "Appendix" means the appendix to the rules, as to rules 3, 4, see *Re Parry*, W. N. 1884, p. 43, cited at page 239, below.

(e) See sect. 46, page 220.

(f) See R. 1 and foot note.

(g) This refers to sale or lease of mansion-house, &c., page 195.

(h) This relates to application of money on sale of lease or reversion, page 211, see Form XVIII., page 248.

(i) Appointment of trustees by the court, page 215, see Form XIX., page 248.

(k) Differences between trustees and tenant for life, page 218.

6. The judge may require notice (a) of any application under the Act to be served upon such persons as he thinks fit, and may give all necessary directions as to the persons (if any) to be served, and such directions may be added to or varied from time to time as the case may require. Where a petition (b) is presented, the petitioner may, after the petition has been filed, apply by summons in chambers (Appendix, Form XXIII.) (c) for directions with regard to the persons on whom the petition ought to be served. If any person not already served is directed to be served with notice of an application, the application shall stand over generally, or until such time as the judge directs. The judge may in any particular case upon such terms (if any) as he thinks fit, dispense with service upon any person upon whom, under these rules, or under any direction of the judge, any application is to be served.

7. It shall be sufficient upon any application under the Act to verify by affidavit the title of the tenant for life and trustees or other persons interested in the application unless the judge in any particular case requires further evidence. Such affidavit may be in the form or to the effect of Form No. VIII. in the Appendix. (d)

8. Any sale authorised or directed by the court under the Act, shall be carried into effect out of court, unless the judge shall otherwise order, and generally in such manner as the judge may direct.

9. Where the court authorises generally the tenant for life to make from time to time leases or grants for building or mining purposes under section 10(e) of the Act, the order shall not direct any particular lease or grant to be settled or approved by the judge unless the judge shall consider that there is some special reason why such lease or grant should be settled or approved by him. Where the court authorises any such lease or grant in any particular case, or where the court authorises a lease under

(a) Sect. 46, page 220.

(b) See as to costs, R. 2 above.

(c) Page 250

(d) Page 244.

(e) These leases are for longer terms or on other conditions than those authorised by the Act. See page 193, and Form III., page 241.

section 15(a) of the Act, the order may either approve a lease or grant already prepared or may direct that the lease or grant shall contain conditions specified in the order or such conditions as may be approved by the judge at chambers without directing the lease or grant to be settled by the judge.

10. Any person directed by the tenant for life to pay into court any capital money (b) arising under the Act may apply by summons at chambers for leave to pay the money into court. (Appendix, Forms IX., X., XI.) (c)

11. The summons shall be supported by an affidavit setting forth—

1. The name and address of the person desiring to make the payment.
2. The place where he is to be served with notice of any proceeding relating to the money.
3. The amount of money to be paid into court and the account to the credit of which it is to be placed.
4. The name and address of the tenant for life under the settlement by whose direction the money is to be paid into court.
5. The short particulars of the transaction in respect of which the money is payable.

12. The order made upon the summons for payment into court, may contain directions for investment (d) of the money on any securities authorised by sect. 21, sub-sect. 1 of the Act (e), and for payment of the dividends to the tenant for life either forthwith or upon production of the consent in writing of the applicant; the signature to such consent to be verified by the affidavit of a solicitor. But if the transaction in respect of which the money arises is not completed at the date of payment into court, the money shall not, without the consent of the applicant, be ordered to be invested in any securities other than those upon which cash under the control of the court may be invested. (f)

(a) Mansion-house, &c., page 495. See also R. 4.

(b) Sects. 21, 22, page 197.

(c) Page 244. (d) See Forms IX., X., page 244. (e) Page 197.

(f) See page 198. Compare Form X. 3, where the lessee names the investment. It would be prudent in consequence of this rule, for tenant for life to arrange beforehand with the lessee as to what investment shall be made.

13. Money paid into court under the Act shall be paid to an account, to be entitled in the matter of the settlement, with a short description of the mode in which the money arises if it is necessary or desirable to identify it, and in the matter of the Act. (Appendix, Forms IX., X., and XI.) (*a*)

14. Any person paying into court any capital money arising under the Act shall be entitled first to deduct the costs of paying the money into court. (*b*)

15. In all cases not provided for by the Act or these rules, the existing practice of the court as to costs (*c*) and otherwise, so far as the same may be applicable, shall apply to proceedings under the Act.

16. The fees and allowances to solicitors of the court in respect to proceedings under the Act shall be those provided by the Rules of the Supreme Court as to costs for the time being in force, so far as they are applicable to such proceedings.

17. The fees to be taken by the officers of the court in respect to proceedings under the Act shall be those provided by the Rules of the Supreme Court as to court fees for the time being in force, so far as they are applicable to such proceedings.

18. These rules shall come into operation from and after the 31st December, 1882.

19. These rules may be cited as the Settled Land Act Rules, 1882.

(Signed)

SELBORNE, C.

COLERIDGE, L.C.J.

G. JESSEL, M.R.

NATH. LINDLEY, L.J.

H. MANISTY, J.

E. FRY, J.

(*a*) Page 244.

(*b*) See Form X.

(*c*) Reference is made in the Act to costs in sects. 21 (x.) 36, 44, 46 (6), 47, and elsewhere. See also Form III., paragraph 2, as to costs out of the settled property, and Form VI., paragraph 2, as to costs out of sale money, &c.

NOTE AS TO THE TITLE TO AND FORMAL PARTS OF AN ORIGINATING SUMMONS UNDER THE SETTLED LAND ACTS.

The forms set out in the appendix to the rules under the Settled Land Act 1882 must be varied in conformity with Form XXV., Appendix L., R. S. C. 1883, *ante*, p. 102, and *post*, Appendix II.

“The address and description of the applicant and of the next friend (if any) should in all cases be stated in the summons, and if the applicant or the parties summoned apply or are summoned as trustees or in a representative capacity the fact should appear in the summons, and the rule (if any) under which the application is made should be stated therein: (see L. T. and W. N. of 9th Feb. 1884.

Instead of the words “Let all parties concerned” at the commencement of the summons it is better to particularise such parties as follows: “Let the defendant *C. D.* [the trustee of, &c., or the tenant for life, or as may be], attend, &c.

It has been thought better not to alter the statutory forms, but the formal parts of an Originating Summons under the Settled Land Act 1882, as it should now stand, will be found *post*, Appendix III.

When a complete settlement of land has been made and derivative settlements have been afterwards made by persons who take interests (not yet in possession) under the original settlement. *Seemle*, the summons need not be entitled under the derivative settlement: (*Re Knowles S. E.*, 51 L. T. Rep. N. S. 655; 27 Ch. Div. 707; 54 L. J. 264, Ch.; 33 W. R. 364.)

In *Re Parry* (W. N., 1888, p. 43) it was held (see rules 3, 4), that a summons which was entitled in the matter of estates settled by a will and of the statute was rightly entitled, without being entitled in two suits which, it was contended, were still alive.

Of course, like other summonses those under the S. L. A. can be amended. Amendments were ordered in *Re Brown's Will* (51 L. T. Rep. N. S. 156; 27 Ch. Div. 179; a case on heirlooms, see p. 214, *sup.*); and in *Re James* (51 L. T. Rep. N. S. 596; W. N. 1884, p. 172; 32 W. R. 898) by making certain infants joint applicants by their next friends.

APPENDIX TO RULES UNDER SETTLED LAND ACT.

FORMS. (a)

FORM I.

TITLE OF PROCEEDINGS.

IN the High Court of Justice,
Chancery Division,
Vice-Chancellor Bacon,
or

Mr. Justice Chitty,

[or other judge before whom the application is to be heard.]

IN the matter of the estate [*or, of the timber (b)*
upon the estate], situate at in the county of
 , [*or, of the chattels*] (c), settled by a settlement
made by an indenture dated the day of , and
made between . [*or, by the Will of dated*
 or, as the case may be].

And in the matter of the Settled Land Act, 1882.

FORM II.

FORMAL PART OF SUMMONS. (d)

Title as in Form I.

Let all parties concerned attend at my chambers at the
Royal Courts of Justice on day, the day of
18 , at o'clock in the forenoon, on the
hearing of an application—

(a.) On the part of *A. B.*, the tenant for life [*or, tenant in tail, or as the case may be, describing the nature of the applicant's estate*] under the above-mentioned settlement.

Or, (b.) On the part of *A. B.*, the tenant for life (*or as the case may be*) under the above-mentioned settlement an infant,

(a) See R. 3, page 235. Usually the name of the judge will be omitted by the applicant, and will be inserted at the office.

(b) Sect. 35, page 212.

(c) Sect. 37, page 213.

(d) See note, *ante*, page 239.

by X. Y., his testamentary guardian [*or, guardian appointed by order dated the , or, next friend*]: (a)

Or, (c.) On the part of C. D. and E. F., the trustees of the above-mentioned settlement for the purposes of the above-mentioned Act. (b)

Or, (d.) On the part of G. H., the tenant for life in remainder [*or, tenant in tail in remainder, or as the case may be, describing the applicant's interest*] under the above-mentioned settlement subject to the life interest of A. B. [*or as the case may be*].

Or, (e.) On the part of I. J., the purchaser of the lands [*or, the timber upon the lands, or chattels, or as the case may be*] settled by the above mentioned settlement.

Or, (f.) On the part of I. J., the lessee under a mining lease (c) dated the 18 , granted under the powers of the above-mentioned Act of the mines and minerals under the lands settled by the above-mentioned settlement.

Or, (g.) On the part of I. J., the mortgagee under a mortgage intended to be created under sect. 18 of the above-mentioned Act of the lands settled by the above-mentioned settlement.

Or, (h.) On the part of K. L., interested under the contract (d) hereinafter mentioned.

Dated the day of 18

This summons was taken out by of , solicitor for the applicant.

To

Add the names of the person (if any) on whom the summons is to be served. (e)

FORM III. (f)

SUMMONS UNDER SECT. 10 (g) FOR GENERAL LEASING POWERS.

Title and formal parts as in Forms I. and II. a or b.

1. That the applicant [*or, in the case of an infant, that the said X. Y. during the infancy of the said A. B.*], and each of his successors in title [*or, in the case of an infant, each of the successors in title of the said A. B.*], being a tenant for life or having the powers of a tenant for life under the above mentioned Act, may pursuant to section 10 of the said Act

(a) Sect. 60, page 228.

(b) See sects. 2 (8), 63, pages 190, 231.

(c) Sects. 6, 7, 9, 11, pages 192-194.

(e) Rules 4-6, page 235.

(g) Page 193.

(d) Sect. 31 (3), page 209.

(f) See Rule 9, page 236.

be authorised from time to time to make building [*or mining*] leases of the lands comprised in the said settlement for the term of years [*or in perpetuity*] on the conditions specified in the said Act [*or in other conditions than those specified in sections 7 to 9 of the said Act*].

2. That the costs (*a*) of this application may be directed to be taxed as between solicitor and client, and that the same when taxed may be paid out of the property (*b*) subject to the said settlement, and that for that purpose all necessary directions may be given.

Note.—The proposed conditions ought not, except in simple cases, to be set forth in the summons.

FORM IV.

SUMMONS UNDER SECTS. 10 (*c*) OR 15 (*d*) FOR AUTHORITY TO GRANT A PARTICULAR LEASE WHERE THE TENANT FOR LIFE HAS ENTERED INTO A CONTRACT.

Title as in Form I.

Formal parts as in Form II., *a* or *b*.

1. That the conditional contract, (*e*) dated the 18 , and made between the applicant [*or the said X. Y.*] of the one part and of the other part, for a [*building or mining*] lease to the said of the hereditaments therein mentioned for the term, and upon the conditions therein stated, may, pursuant to section 10 [*or 15*] of the above-mentioned Act be approved, and that the said *A. B.* [*or X. Y.*] may be authorised to execute a lease in pursuance of the said contract.

2. (*Add application for costs as in Form III., 2.*)

FORM V.

SUMMONS UNDER SECTS. 10(*c*) OR 15(*d*) FOR AUTHORITY TO GRANT A PARTICULAR LEASE WHEN NO CONTRACT HAS BEEN ENTERED INTO.

Title as in Form I.

Formal parts as in Form II., *a* or *b*.

1. That the [*building or mining*] lease intended to be granted to of the lands [*or of the mansion house,*

(*a*) See Rule 15, page 238, and foot note.

(*b*) Sect. 47, page 220.

(*c*) Extra length of term or other conditions not authorised by the Act, page 193.

(*d*) Mansion-house, &c., page 195.

(*e*) See sect. 31, page 208.

&c.], settled by the said settlement, may, pursuant to section 10 [or 15] of the above-mentioned Act, be approved, and that the applicant [or the said X. Y.] may be authorised to execute the same.

2. (*Add application for costs as in Form III., 2.*)

FORM VI.

SUMMONS UNDER SECTS. 15 (a), 35 (b), 37 (c), FOR A SALE OUT OF COURT OF THE PRINCIPAL MANSION HOUSE, AND DEMESNES, OR OF TIMBER OR CHATTELS.

Title as in Form I.

Formal parts as in Form II. a or b.

1. That the applicant [*or in the case of an infant the said X. Y.*] may be authorised to sell the principal mansion house [*or the timber ripe and fit for cutting*] on the land [*or the furniture and chattels*] settled by the above-mentioned settlement in such manner, and subject to such particulars, conditions, and provisions as he may think fit.

2. That the costs of this application may be taxed as between solicitor and client, and that C. D. and E. F., the trustees of the said settlement, may be at liberty to pay the cost when taxed out of the proceeds of the said sale [*or in the case of timber, out of the three-fourths of the proceeds of the said sale to be set aside as capital money arising under the said Act*], *or if this Form is not applicable as in Form III., 2.*

FORM VII.

SUMMONS UNDER SECTS. 15 (a), 35 (b), OR 37 (c), FOR SALE BY THE COURT OF THE PRINCIPAL MANSION HOUSE, AND DEMESNES, OR OF TIMBER OR CHATTELS.

Title as in Form I.

Formal parts as in Form II., a or b.

1. That the principal mansion house [*or the timber ripe and fit for cutting*] on the land [*or the furniture and chattels*], settled by the above-mentioned settlement, may be sold under the direction of the court.

2. (*Application for costs as in Form III., 2.*)

(a) Mansion House, &c., page 195.

(b) Timber. see page 212.

(c) Chattel "heirlooms," see page 213.

FORM VIII. (a)

AFFIDAVIT VERIFYING TITLE.

Title as in Form I.

I, _____, of _____ make oath and say as follows:

1. By the above-mentioned settlement the above-mentioned lands [*or* certain chattels, *shortly describing them*] stand limited to uses [*or* upon trusts] under which *A. B.* is [*or* I am] beneficially entitled in possession as tenant for life [*or* tenant in tail *or* tenant in fee simple, with an executory gift over, *or as the case may be.*]

2. (*If it is the fact.*) The said *A. B.* is an infant of the age of _____ years or thereabouts.

3. *C. D.*, of _____, and *E. F.*, of _____, are trustees under the said settlement, with a power of sale of the said lands [*or* with power of consent to *or* approval of the exercise of a power of sale of the said lands contained in the said settlement, *or* are the persons by the said settlement declared to be trustees thereof for purposes of the above-mentioned Act. (b)

FORM IX. (c)

SUMMONS UNDER SECT. 22 (d) BY PURCHASER FOR PAYMENT INTO COURT OF PURCHASE MONEY OF SETTLED LAND, TIMBER, OR CHATTELS.

Title as in Form I.

Formal parts as in Form II. e.

1. That the applicant may be at liberty to pay into court to the credit of "In the matter of the settlement, dated the _____ and made between _____ [*or* will, &c.] proceeds of sale of the *A.* estate [*or as the case may be*], and in the matter of the Settled Land Act, 1882," the sum of _____ l. on account of the purchase money of the said *A.* estate [*or as the case may be*] settled by the said settlement [*or* will, &c.]

2. That such directions may be given for the investment (f) of the said sums when paid into court, and the accumulation

(a) See Rule 7, page 236.

(b) See sects. 2 (8), 63, pages 190, 231.

(c) As to this and the two following forms, see RR. 10-14, page 237.

(d) Page 203.

(f) It is presumed that the tenant for life will be allowed to choose the investment within the limits presented by sect. 21 (1), page 197, see Rule 12, page 237. The money is paid into court by his direction, sect. 22 (1), Rule 10. He must be served (Rule 4, page 235.)

or payment of the dividends of the securities, representing the same as the court may think proper.

FORM X.

SUMMONS UNDER SECT. 22 FOR PAYMENT INTO COURT BY
LESSEE UNDER A MINING LEASE (*see* Sect. 11).

Title as in Form I.

Formal parts as in Form II. *f*.

1. That the applicant may be at liberty to pay into court to the credit of "In the matter of the settlement dated the and made between [*or* the will, &c.] mineral rents under lease dated the and in the matter of the Settled Land Act, 1882," the sum of *l*. being three-fourths [*or* one-fourth] (*a*) of the rents payable by him under the said lease for the half-year ending the less (*b*) *l*. the costs of payment into court.

2. That the applicant may be at liberty on or before the day of and the day of in every year during the term created by the said lease to pay into court to the credit aforesaid, so much of the rents payable by him under the said lease as is by section 11 of the above-mentioned Act directed to be set aside as capital money arising under the said Act after deducting therefrom the costs of payment in, the amount paid in to be verified by affidavit.

3. That the said sum of *l*. and all other sums to be paid into court to the credit aforesaid may be invested in the purchase of (*name the investment*) (*c*) to the like credit and that the dividends on the said when purchased may be paid to *A. B.*, the tenant for life under the above-mentioned settlement during his life or until further order.

FORM XI.

SUMMONS UNDER SECT. 22 (*d*) FOR PAYMENT INTO COURT BY
MORTGAGEE (*see* Sect. 18). (*d*)

Title as in Form I.

Formal parts as in Form II. *g*.

1. That the applicant may be at liberty to pay into court

(*a*) The amount varies according as the tenant for life is or is not impeachable for waste (sect. 11, *see* page 194).

(*b*) As to deduction of costs before payment in, *see* Rule 14, page 238.

(*c*) Compare Form IX., paragraph 2, and *see* last part of R. 12.

(*d*) Sect. 18, page 196, enables tenant for life to raise money for enfranchisement, &c., by mortgage, &c. For sect. 22 *see* page 203.

to the credit of "Money advanced on mortgage of lands settled by the settlement dated the and made between [*or the will, &c.*] and in the matter of the Settled Land Act, 1882," the sum of l., being the amount agreed to be advanced by him on mortgage of the lands comprised in the above-mentioned settlement less the costs of payment in. (a)

2. (*Add directions for investment as in Form VIII. 2.*) (b)

FORM XII. (c)

SUMMONS UNDER SECT. 26 (1). (d)

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the scheme left at my chambers this day for the execution of improvements on the lands settled by the above-mentioned settlement may be approved.

2. (*Add application for costs as in Form III. 2.*)

FORM XIII.

SUMMONS UNDER SECT. 26, SUB-SECT (2) (ii.) (e) FOR APPOINTMENT OF AN ENGINEER OR SURVEYOR.

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That *M. N.* of Engineer [*or surveyor*] may be approved as engineer [*or surveyor*] for the purposes of section 26, sub-section (2) (ii.) of the above-mentioned Act.

2. (*Add application for costs as in Form III. 2.*)

(a) It will be noticed that the object for which the mortgage is made is not mentioned. By sect. 40, the mortgagee is not concerned to see that any money advanced is wanted for any purpose of the Act.

(b) This is a mistake. Form VIII. (2) does not refer to investment. Possibly Form IX. (2) is meant, but this is unsuitable as of course the money must be spent on "the special authorised object for which the same is raised" (sect. 21), and only the surplus invested.

(c) This and the four following forms relate to improvements, and the spending of capital money on them.

(d) Page 206.

(e) Page 206.

FORM XIV. (a)

NOMINATION OF AN ENGINEER OR SURVEYOR BY THE TRUSTEES.

Title as in Form I.

We *C. D.* of and *E. F.* of the trustees of the above-mentioned settlement for the purposes of the above-mentioned Act, hereby nominate of Engineer [*or surveyor*], for the purposes of section 26, sub-section (2) (ii.) (b) of the said Act.

(Signed) *C. D.*
E. F.

FORM XV.

SUMMONS UNDER SECT. 26, SUB-SECT. (2) (iii) (c)

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That *C. D.* and *E. F.*, the trustees of the above-mentioned settlement, for the purposes of the above-mentioned Act (*d*) may be directed to apply the sum of *l.* out of the capital money arising under the said Act in their hands subject to the said settlement in payment for [*describe the work or operation (e)* being [*part of*] an improvement executed upon the lands subject to the said settlement pursuant to a scheme approved by the said *C. D.* and *E. F.* under the said Act.

2. (*Add application for costs as in Form III. 2.*)

FORM XVI.

SUMMONS UNDER SECTION 26, SUB-SECT. 3. (*f*)

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the sum of *l.* may be ordered to be raised out of the in court to the credit of , and that the same when raised may be paid to upon his undertaking to apply the same in payment for [*describe the works or operation*] being part of an improvement executed upon the land settled by the above-mentioned settlement pursuant to the scheme approved by Order dated the

2. (*Add application for costs as in Form III. 2.*)

(a) The words "*competent*" and "*able practical*" in the Act are omitted in this form.

(b) Page 206.

(c) Page 206.

(d) *Sic.* But clearly a comma should come after "Act."

(e) *Sic.* A bracket is needed here.

(f) Page 206.

FORM XVII.

SUMMONS UNDER SECTION 31. (a)

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the applicant may be at liberty to enforce [*or carry into effect or vary or rescind as the case may be*] the contract entered into between the applicant of the one part, and of the other part.

2. Or that such directions may be given relating to the said contract as the judge may think fit.

3. (*Add application for costs as in Form III. 2.*)

FORM XVIII.

SUMMONS UNDER SECT. 34 FOR APPLICATION OF MONEY PAID FOR A LEASE OR REVERSION. (b)

Title as in Form I.

Formal parts as in Form II., *a*, *b*, or *d*.

1. That the sum of *l.* being the proceeds of sale of a lease for years [*or life or a reversion or other interest describing it*] settled by the above-mentioned settlement, may, pursuant to section 34 of the above-mentioned Act, be directed to be applied for the benefit of the parties interested under the said settlement in such manner as the court may think fit.

(*Add application for costs as in Form III. 2.*)

FORM XIX.

SUMMONS UNDER SECT. 38 FOR THE APPOINTMENT OF NEW TRUSTEES. (c)

Title as in Form I.

Formal parts as in Form II., *a*, *b*, *c*, or *d*.

1. That *G. H.* and *I. J.* may be appointed trustees under the above-mentioned settlement for the purposes of the above-mentioned Act.

2. (*Add application for costs as in Form III. 2.*)

(a) See pages 208, 209.

(b) See page 211, and Rule 4, page 235.

(c) See page 215, and Rule 4, page 255.

FORM XX.

SUMMONS UNDER SECT. 44. (a)

Title as in Form I.

Formal parts as in Form II., *a, b, or c.*

1. That it may be declared that (*set out the declaration required.*)

2. (*Add application for costs as in Form III. 2, or as the circumstances require.*)

FORM XXI.

SUMMONS UNDER SECTION 56 (b) FOR ADVICE AND DIRECTION.

Title as in Form I.

Formal parts as in Form II., *a to h.*

For the opinion, advice, and direction of the Judge on the following questions :

1. Whether.
2. Whether.
3. Whether.

(*or if the questions involve complicated facts*)

for the opinion, advice, and direction of the Judge on the facts and questions submitted by the statement left in my chambers this day.

(*Add application for costs as in Form III. 2.*)

FORM XXII.

SUMMONS UNDER SECT. 60 (c) FOR APPOINTMENT OF PERSONS TO EXERCISE POWERS ON BEHALF OF INFANT.

Title as in Form I.

Formal parts as in Form II., *b.*

1. That the powers conferred upon a tenant for life by sections 6 to 13 (*d*), both inclusive, and sections 16 to 20 (*e*), both inclusive, of the above-mentioned Act (*or such other powers as it is desired to exercise*) may be exercised by the said on behalf of the said during his minority.

2. (*Add application for costs as in Form III. 2.*)

¹ (a) See page 218. This relates to differences between tenant for life and the trustees. See Rule 4, page 235.

(b) This is only available in certain cases. See page 224.

(c) Page 228. Compare Forms II. (b), III., VI., pages 240-243.

(d) Pages 192, 193.

(e) Page 196.

FORM XXIII.

SUMMONS FOR DIRECTIONS AS TO SERVICE OF A
PETITION. (a)

Title as in Form I.

Formal parts as in Form II.

That directions may be given as to the persons to be served
with the petition presented in the above matter on the
day of 18 .

(a) See Rule 6, page 236, and as to costs of petition Rule 3, page 235.

CHAPTER XIX.

THE MARRIED WOMEN'S PROPERTY ACT,
1882.

45 & 46 VICT. c. 75.—18th August, 1882.

ALTHOUGH this Act only partially appertains to Originating Summons, as it is a comparatively short but extremely important statute, it is considered that it may conveniently find a place here with a commentary thereon.

General Construction of Statute.

Where the Act affects rights it is, except the language is clear to the contrary, to be construed prospectively only (*Re Marsh* ; *Mander v. Harris*, 51 L. T. Rep. N. S. 380 ; 27 Ch. Div. 166, C. A. ; *Turnbull v. Forman*, 53 L. T. Rep. N. S. 128 ; 15 Q. B. Div. 234, C. A.) ; but where it affects procedure, it affects all subsequent procedure : (*Turnbull v. Forman* (*ubi sup.*), and see *Weldon v. Winslow*, 51 L. T. Rep. N. S. 643 ; 13 Q. B. Div. 784), and other cases on "Power to Sue and be Sued" below.) "It is not intended to alter any rights except those of husband and wife *inter se*:" (per Cotton, L.J. in *Mander v. Harris*.) The Act is in favour of wives, not for relief of husbands : (*Seroka v. Kattenberg*, 54 L. T. Rep. N. S. 649 ; 17 Q. B. Div. 177.) *Semble*, a wife has more rights by statute as to separate property than to separate estate formerly : (*Weldon v. De Bathe*, 53 L. T. Rep. N. S. 520 ; 14 Q. B. Div. 342, C. A.) In *Thompson v. Krise* (75 L. T. 235) Mr. Justice Lopes is reported to have said that by this Act married women had been "metamorphosed into spinsters" with respect to their separate property, and in *Re Queade's Trusts* (53 L. T. Rep. N. S. 77) Mr. Justice Chitty declared that a *feme couverte* is made for all purposes a *feme sole* with regard to her separate property. But these general expressions must not be misunderstood. As was laid down in *Myles v. Burton* (14 L. Rep. Ir. 265), this Act does not alter the principle of *Pike v. Fitzgibbon* (49 L. T. Rep. N. S. 562 ; 17 Ch. Div. 454), and does not place *feme couverte* in the position of *feme sole* "purely and simply." And recent decisions have shown this more clearly. As will be seen below, her contracts neither bind her personally nor her property other than separate property ; and, if she has no separate property when the contract is made, it binds nothing at all.

She cannot be committed to prison for default in paying a sum for which judgment has been recovered by virtue of sect. 1 (2) of the M. W. P. Act, 1882 (*Scott v. Morley*, 57 L. T. Rep. N. S. 919; 20 Q. B. Div. 120; 57 L. J. 149, Q. B.; 36 W. R. 142, C. A.), so that there is not the same remedy against the married woman on contracts under that Act as against a spinster. Nor does the Act enable her to be made a bankrupt, except she trades separately from her husband. Although she may sue and be sued "in matters relating to herself personally," yet she should not be a guardian *ad litem* of an infant or next friend. Her personal incapacity in this respect has not been removed: (*Re The Duke of Somerset*; *Thynne v. St. Maur*, 56 L. T. Rep. N. S. 145; 34 Ch. Div. 465; 56 L. J. 733, Ch.; 35 W. R. 273.) She may be ordered to give security for costs of appeal: (*Weldhen v. Scattergood*, 82 L. T. 394.)

And it has been recently decided by Mr. Justice Chitty in chambers (85 L. T. 21) that the husband is still entitled to his curtesy out of her separate real estate undisposed of by will; and as to her separate personalty so undisposed of, see *Re Lambert's Estate* (39 Ch. Div. 620, *post*, p. 254).

Effect on Previous Statutes.

Perhaps those cases which most strongly indicate the "metamorphosis" of the married woman into a spinster (as regards separate property), are those where express provisions relating to married women have been decided not now to apply to the *feme couverte* of the present day in matters relating to her separate property. Thus, in *Lowe v. Fox* (53 L. T. Rep. N. S. 886; 15 Q. B. Div. 667) the Court of Appeal held that a married woman became "discover" within the meaning of the Statute of Limitations (21 Jac. 1, c. 16), when the M. W. P. Act came into operation. It was so held also in *Weldon v. Neal* (51 L. T. Rep. N. S. 289). And in *Riddell v. Errington* (50 L. T. Rep. N. S. 584; 26 Ch. Div. 220) it was held that, notwithstanding sect. 50 of the Settled Estates Act, 1877, expressly requires separate examination, it was needless where she married since the Act. The same rule would apply to property within sect. 5 of the Act, but not to property acquired before the Act by a woman also married before it: (*Re Harris's Settled Estate*, 51 L. T. Rep. N. S. 855; 28 Ch. Div. 171.) But separate examination was ordered in *Re Arabin's Trusts* (52 L. T. Rep. N. S. 728) notwithstanding sect. 32 of the Settled Land Act. And the decision in *Clements v. Ward* (56 L. T. Rep. N. S. 850; 35 Ch. Div. 589) and the remarks of Lord Justice Fry in *Scott v. Morley* (*ubi sup.*) may be considered in favour of a restrictive construction of the Act with reference to earlier statutes.

AN ACT TO CONSOLIDATE AND AMEND THE ACTS RELATING TO THE PROPERTY OF MARRIED WOMEN.—[18TH AUGUST, 1882.]

Whereas it is expedient to consolidate and amend the Act of the thirty-third and thirty-fourth Victoria, chapter ninety-three, intituled "The Married Women's Property Act, 1870," and the Act of the thirty-seventh and thirty-eighth Victoria, chapter fifty, intituled "An Act to amend the Married Women's Property Act (1870)":

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the authority of the same, as follows:

1. (1.) A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee.

Married woman to be capable of holding property and of contracting as a *feme sole*.

Will of Married Women.

This sub-section was held in *Re Smith; Clements v. Ward* (56 L. T. Rep. N. S. 850; 35 Ch. Div. 589) by Mr. Justice Stirling, not to enable a married woman, acting without her husband, to leave 300*l.* for building a church under 43 Geo. 3, c. 108. That statute authorises any person (notwithstanding the Mortmain Acts) to give a sum not exceeding 500*l.*, or land not exceeding five acres, for church building; but provides that this is not to enable persons within age, or insane, or women *couverte* without their husbands, to make such gifts. The learned judge referred to *Re Price; Stafford v. Stafford* (52 L. T. Rep. N. S. 430; 28 Ch. Div. 709) as showing that a married woman's will under the M. W. P. Act does not always take effect exactly as if she were a spinster. In *Re Price* it was held that this section only enables a married woman to dispose of property to which she is entitled during coverture, so that by will made during coverture she cannot dispose of property acquired after coverture; and that *Willock v. Noble* (32 L. T. Rep. N. S. 410; L. Rep. 7 H. of L. 580) applied. The decision in *Re*

Price is doubted by Messrs. Wolstenholme and Turner (C. A. 4th edit. 154).

The Act does not, in the construction of wills made before or after the Act, alter the rule that on a gift to A. and wife in joint tenancy with B., the husband and wife together only take one moiety (*Re March*; *Mander v. Harris*, 51 L. T. Rep. N. S. 380; 27 Ch. Div. 166.) See comment in 77 L. T. 228, and *Re Jupp*; *Jupp v. Buckwell* (59 L. T. Rep. N. S. 129; 39 Ch. Div. 148; 57 L. J. 774, Ch.; 36 W. R. 712). In *Re Ievens* (13 L. Rep. Ir. 1) a general grant of probate of a married woman appointing executors was made, although the will was made in exercise of a power, and contained no disposition of property outside the power. In *the Goods of Cubbon* (57 L. T. Rep. N. S. 87; 11 P. Div. 169) a married woman acquired real estate under a deed dated since the M. W. P. Act, 1882, came into force. She made a will devising the realty, and appointing executors. Her personal estate consisted of a small sum in the savings bank, and of rents due and accruing but not paid at the time of her death, altogether under 13*l.* value. Notwithstanding *The Goods of Tomlinson* (46 L. T. Rep. N. S. 484; 6 P. Div. 209) probate was granted limited to separate personality. The practice of inserting a limitation in the probate of a married woman's will will no longer be followed, and a general grant will henceforth be adopted: (*In the Goods of Amelia Price, deceased*, 57 L. T. Rep. N. S. 497; 12 P. Div. 137.) See also *In the Goods of Homfray*, reported in a note to the case of *Amelia Price*, and *Harding v. Sutton* (59 L. T. Rep. N. S. 838). The New Rules of the 29th March, 1887, of which the substance is given in the same note, provide for grants of wills of married women and of widows made during coverture in ordinary form.

Other Dispositions.

A married woman can dispose of statutory separate real estate under this Act by deed without acknowledgment or the concurrence of her husband, in the same manner as if she were a spinster.

On her death intestate such real estate will descend to the heir-at-law, subject to her husband's estate by the curtesy, see 85 L. T. 21.

With regard to her personal estate, of whatever description, if she dies intestate, it is now decided that the husband if surviving her will still be entitled thereto. See *Re Lambert's estate*; *Stanton v. Lambert* (59 L. T. Rep. N. S. 429; 39 Ch. Div. 626; 57 L. J. 927, Ch.).

As to his administering to her, see *Smart v. Tranter* (59 L. T. Rep. N. S. 890; 40 Ch. Div. 165).

(2.) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise.

Contracts of Married Women.

Notwithstanding the Act, it is clear that a married woman's contracts are on a very different footing from those of a *feme sole*. She is not bound personally by them: (*Scott v. Morley*, 57 L. T. Rep. N. S. 919; 20 Q. B. Div. 120, 128; 57 L. J. 43, Q. B.; 36 W. R. 67; 52 J. P. 230.) They only bind her separate property. Moreover, she cannot render herself liable in respect of her separate property on any contract, unless she has some separate property at the time the contract is made. And, in an action against a married woman to recover the price of goods sold and delivered to her, it was held that the plaintiff was bound to prove that the defendant had separate property when she made the contract: (*Palliser v. Gurney*, 83 L. T. 217; 19 Q. B. Div. 519, Ct. of App.) If she has no separate property she cannot contract, or rather her contract will be worthless. This case follows *Re Shakespear*; *Deakin v. Lakin* (53 L. T. Rep. N. S. 145; 30 Ch. Div. 169), where it was held that the Act does not empower a married woman to deal with anything but separate estate; so that an assignment by her does not bind a reversionary interest contingent on her surviving her husband. In *Tetley v. Griffith* (57 L. T. Rep. N. S. 673; 36 W. R. 96) the plaintiff was allowed to amend, by stating the defendant had separate estate. In *Whittaker v. Van der Swipen* (85 L. T. 246, 247) an action for specific performance against a married woman was dismissed with costs on the ground that plaintiff had not proved that defendant had separate estate in existence at the date the contract was entered into. The term "separate property" is explained in *Ex parte Gilchrist*; *Re Emma Armstrong* (55 L. T. Rep. N. S. 538; 17 Q. B. Div. 521).

Power to Sue and be Sued.

A married woman may petition alone for appointment of new trustees (*Re Outwin's Trusts*, 48 L. T. Rep. N. S. 410), and take out administration without consent or joinder of her husband (*In the Goods of Ayres*, 8 P. Div. 168), and can sue without her husband for a tort committed before the Act: (*James v. Barraud*, 49 L. T. Rep. N. S. 300; 31 W. R. 786; *Weldon v. Winslow*, 51 L. T. Rep. N. S. 643; 13 Q. B. Div. 784, Ct. of App.; *Lowe v. Fox*, 53 L. T. Rep. N. S. 886; 15 Q. B. Div. 667, C. A.) She has an action of trespass against a stranger, who, with the husband's authority, enters on a house, belonging to her as separate property under the M. W. P. Act, 1870, and in her sole occupation: (*Weldon v. De Bathe*, 53 L. T. Rep. N. S. 520; 14 Q. B. Div. 339.)

Final Judgment.

The proper form of final judgment against a married woman, under sect. 1 (sub-s. (2)) was settled by the Court of Appeal in *Scott v. Morley* (57 L. T. Rep. N. S. 919; 20 Q. B. Div. 120, 132; 57 L. J. 43, Q. B.; 36 W. R. 67; 52 J. P. 230) as follows: "It is adjudged that the plaintiff do recover £ , and costs (to be taxed) against the defendant (the married woman), such sum and costs to be payable out of her separate property, as hereinafter mentioned, and not otherwise. And it is ordered that execution hereon be limited to the separate property of the defendant (the married woman) not subject to any restriction against anticipation, unless, by reason of sect. 19 of the Married Woman's Property Act, 1882, the property shall be liable to execution, notwithstanding such restriction."

This judgment "creates no general personal liability:" (per Fry, J. in that case.)

In an action against husband and wife to recover a debt of the wife contracted before marriage where the marriage has taken place after the coming into operation of the Married Women's Property Act, 1870, and the Married Women's Property Act, 1874, but before the coming into operation of the Married Women's Property Act, 1882, it is not necessary to prove the existence of separate estate at the date of the judgment, though such evidence might perhaps be necessary as regards a debt contracted during coverture: (*Downe v. Fletcher and Wife*, 59 L. T. Rep. N. S. 180; 21 Q. B. Div. 11; 36 W. R. 694; 52 J. P. 375.)

The M. W. P. Act, 1870, s. 12, extends to property settled to the separate use of a married woman without power of anticipation: (*Axford v. Reid*, 22 Q. B. Div. 548.)

For earlier cases, see *Draycott v. Harrison* (17 Q. B. Div. 147;

81 L. T. 4; in the County Court, 80 L. T. 360); *Bursill v. Tanner* (50 L. T. Rep. N. S. 589; 13 Q. B. Div. 691); *Turnbull v. Forman* (53 L. T. Rep. N. S. 128; 15 Q. B. Div. 234); *Gunston v. Maynard* (75 L. T. 102); *Perks v. Mybred* (76 L. T. 336); and *Gloucestershire Banking Company v. Phillipps* (50 L. T. Rep. N. S. 360; 12 Q. B. Div. 533), where the wife was brought in as a "third party," and the Irish cases of *Nicholls v. Morgan* (16 L. Rep. Ir. 409, noted 80 L. T. 148) and *Myles v. Burton* (14 L. Rep. Ir. 265). The wife cannot be committed under sect. 5 of the Debtors Act, 1869, for default in paying a sum for which judgment has been recovered under the M. W. P. Act: (*Scott v. Morley*, 57 L. T. Rep. N. S. 919; 20 Q. B. Div. 120.) This extends *Meager v. Pellew* (53 L. T. Rep. N. S. 67; 14 Q. B. Div. 973) and *Draycott v. Harrison* (17 Q. B. Div. 147; 81 L. T. 4), and appears to overrule *Paul v. Price* (83 L. T. 223, County Court). In Ireland commitment of a married woman was ordered for nonpayment of instalments of amount of judgment recovered against her: (*Johnstone v. Browne*, 18 L. Rep. Ir. 428; 20 L. Rep. Ir. 443, noted in 84 L. T. 77.) In *Morgan v. Byre* (20 L. Rep. Ir. 541) the Irish Court held that an order under the Debtors Act (Ireland), 1872 (35 & 36 Vict. c. 57) for payment by instalments would not be made against a married woman whose only separate estate is restrained from anticipation, even though, since the date of the judgment, she has received income.

Receiver.

A claim against separate property may be enforced by an order appointing a receiver or directing the trustees to pay, and inquiry directed as to separate estate: (*Re Peace and Waller*, 49 L. T. Rep. N. S. 637; 24 Ch. Div. 405.) In Ireland the plaintiff in an action against a married woman was appointed receiver without security or commission: (*McGarry v. White and Wife*, 16 L. Rep. Ir. 322, noted in 80 L. T. 148.) A receiver was appointed in *Beckett v. Tasker*, but the order was discharged on appeal, as the property in question was not liable to satisfy the judgment: (56 L. T. Rep. N. S. 636; 19 Q. B. Div. 7; 36 W. R. 158.)

Husband's Liability for Wife's Torts.

This Act does not abolish the liability of a husband for his wife's wrongful acts, and the plaintiff may sue the husband and wife jointly, or the wife alone, for wrongs committed by her after the marriage: (*Seroka and Wife v. Kattenberg and Wife*, 54 L. T. Rep. N. S. 649; 17 Q. B. Div. 177.) And see *Bahin v. Hughes* (54 L. T. Rep. N. S. 188; 31 Ch. Div. 390.)

Costs.

A married woman suing without her husband is not bound to give security for costs, though it is shown that she has no separate estate (*Re Isaac; Jacob v. Isaac*, 53 L. T. Rep. N. S. 478; 30 Ch. Div. 418; *Severance v. Civil Service Supply*, 48 L. T. Rep. N. S. 485; extending *Threlfall v. Wilson*, 48 L. T. Rep. N. S. 238; 8 Prob. Div. 18); and she can give a sole undertaking for damages: (*Re Prynne*, 53 L. T. Rep. N. S. 465.) In *Re Andrews; Edwards v. Dewar* (53 L. T. Rep. N. S. 422; 30 Ch. Div. 159), trustees were authorised to retain costs of proceedings by Originating Summons against them by married woman (without next friend), although she was restrained from anticipation. But this principle was observed upon in *Re Glanville; Ellis v. Johnson* (54 L. T. Rep. N. S. 411; 31 Ch. Div. 532, Ct. of App.).

Since the M. W. P. Act a judge has power to order costs to be paid by a married woman out of her separate property and not only out of that she had when the cause of action arose; but he has a discretion to order costs to be paid out of part only of the separate property: (*Neville v. Baker and Wife*, July 12, 1888; 4 *Times* Rep. 674, C. A.)

Whether the Rules of the Divorce Court as to the wife's costs are applicable to women married since the Act *quære*, see *Otway v. Otway* (59 L. T. Rep. N. S. 159; 13 P. Div. 141).

In *Re Thompson; Stevens v. Thompson* (59 L. T. Rep. N. S. 427; 38 Ch. Div. 317, C. A.) it was held that a married woman who had taken out an Originating Summons by her next friend was liable to find security for costs; but, *semble*, the next friend should give the security.

(3.) Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown.

It was held that the contrary was shown where the wife had no separate property except what was inalienable: (*Harrison v. Harrison*, 60 L. T. Rep. N. S. 39; 13 P. Div. 180, 185.)

(4.) Every contract entered into by a married woman with respect to and to bind her separate property shall bind, not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire.

These sub-sections are not retrospective so as to include contracts made before the Act: (*Re Roper*; *Roper v. Doncaster*, 59 L. T. Rep. N. S. 203; 39 Ch. Div. 482; 36 W. R. 750.) But consent of married woman given after the Act, in an action in respect of a contract made before the Act, to reference, is an agreement within them: (*Conolan v. Leyland*, 51 L. T. Rep. N. S. 895; 27 Ch. Div. 632.) This was followed in *Turnbull v. Forman* (53 L. T. Rep. N. S. 128; 15 Q. B. Div. 234), and *Bursill v. Tanner* (50 L. T. Rep. N. S. 589; 13 Q. B. Div. 691) was questioned. Sub-sect. (4) does not enable a married woman who has no separate property, to bind separate property which she afterwards may possibly acquire: (*Re Shakespear*; *Deakin v. Lakin*, 53 L. T. Rep. N. S. 145; 30 Ch. Div. 169.) It applies to married women, not to widows, and to separate property which the married woman, not the widow, may acquire: (per Wills, J. in *Beckett v. Tasker*, 56 L. T. Rep. N. S. 636; 19 Q. B. Div. 7, 10; 36 W. R. 158.)

(5.) Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole*.

This does not enable trustee in bankruptcy to compel a married woman, being a bankrupt trader, to exercise a general power of appointment: (*Ex parte Gilchrist*; *Re Emma Armstrong*, 55 L. T. Rep. N. S. 538; 17 Q. B. Div. 521, Ct. of App.) And see s.c. on another point (59 L. T. Rep. N. S. 806; 21 Q. B. Div. 264; 57 L. J. 555, Q. B.; 36 W. R. 772.)

A married woman possessed of separate estate, but not carrying on a trade separately from her husband, is not subject to the operation of the bankruptcy laws, and cannot commit an act of bankruptcy under sect. 4, sub-sect. (1) (g), of the Bankruptcy Act, 1883. The judgment obtained (under the Married Women's Property Act) "is not a final judgment against the married woman, it creates no personal liability at all; but is a judgment against her property, not against herself:" (*Re Gardiner*; *Ex parte Coulson*, 58 L. T. Rep. N. S. 119; 20 Q. B. Div. 249; 57 L. J. 149, Q. B.; 36 W. R. 142.)

2. Every woman who marries after the commencement of this Act, shall be entitled to have and to hold as her separate property and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or

Property of
a woman
married after
the Act to be
held by her as
a *feme sole*.

devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade or occupation, in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill.

See "General Construction of Statute" and "Effect on previous Statutes," *ante*, pp. 251, 252.

Loans by wife
to husband.

3. Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied.

Loans by Wife to Husband.

This section only applies where the husband is a sole trader, and not where the loan is to the firm in which her husband is a partner: (*Re Tuff and Nottingham*, 56 L. T. Rep. N. S. 573; 19 Q. B. Div. 88.) It does not apply to a loan to a husband for private (not trade) purposes: (*Re Tidswell*; *Ex parte Tidswell v. Viney*, 57 L. T. Rep. N. S. 416.) Where a married woman seeks to prove under her husband's bankruptcy for a loan, she must show that the loan was not for trade purposes, otherwise she cannot vote or prove till the other creditors have been paid in full: (*Re Genese*; *Ex parte District Bank of London*, 16 Q. B. Div. 700; 55 L. J. 118, Q. B.) As to the view of this section taken in Ireland, see *Alexander v. Burnhill* (2) (L. Rep. Ir. 511) cited 86 L. T. 330). This section is not retrospective so as to effect previously existing rights: (*Re Home*; *Ex parte Home*, 54 L. T. Rep. N. S. 301.) In *Re Bailey* (78 L. T. 264, County Court) it was held that it only applied to money actually lent, not to money found due on adjustment of accounts, and not to money lent before marriage. In *Re Genese* Mr. Justice Cave said that the principle of the section is the same as that of sect. 5 of Bovill's Act (28 & 29 Vict. c. 86) and the Acts are also compared in *Re Tidswell*.

4. The execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act. Execution of general power.

This does not apply to debts incurred before the commencement of this Act, see *Re Roper*; *Roper v. Doncaster* (59 L. T. Rep. N. S. 202; 39 Ch. Div. 482; 36 W. R. 750).

5. Every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money, and property so gained or acquired by her as aforesaid. Property acquired after the Act by a woman married before the Act to be held by her as a *feme sole*.

Women married before the Act.

This only applies to property the title to which accrued to the married woman for the first time after the commencement of the Act, and not to property contingently or in reversion hers before, but which falls into possession after: (*Reid v. Reid*, 54 L. T. Rep. N. S. 100; 31 Ch. Div. 402, C. A.; *Dixon v. Smith*, 80 L. T. 355; 54 L. J. 964, Ch. *Dixon v. Smith*, came before the court also in 57 L. T. Rep. N.S. 94; 35 Ch. Div. 4. For collection of previous conflicting decisions see 80 L. T. 223, and dictum of Irish Court in *Re Trench's Trust*; *Ex parte McCormac* (80 L. T. 147). In an anonymous case noted in 76 L. T. 222, Mr. Justice Kay held that a lady who was entitled for life (with restraint), but had general powers of appointment, could appoint to herself, and then call for the fund.

6. All deposits in any post office or other savings bank, or in any other bank, all annuities granted by the Commissioners for the Reduction of the National Debt or by any other person, and all sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England, or of any other bank, which As to stock, &c., to which a married woman is entitled.

at the commencement of this Act are standing in the sole name of a married woman, and all shares, stock, debentures, debenture stock, or other interests of or in any corporation, company, or public body, municipal, commercial, or otherwise, or of or in any industrial, provident, friendly, benefit, building, or loan society, which at the commencement of this Act are standing in her name, shall be deemed, unless and until the contrary be shown, to be the separate property of such married woman; and the fact that any such deposit, annuity, sum forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England or of any other bank, share, stock, debenture, debenture stock, or other interest as aforesaid, is standing in the sole name of a married woman, shall be sufficient *primâ facie* evidence that she is beneficially entitled thereto for her separate use, so as to authorise and empower her to receive or transfer the same, and to receive the dividends, interest, and profits thereof, without the concurrence of her husband, and to indemnify the Postmaster General the Commissioners for the Reduction of the National Debt, the Governor and Company of the Bank of England, the Governor and Company of the Bank of Ireland, and all directors, managers, and trustees of every such bank, corporation, company, public body, or society as aforesaid, in respect thereof.

As to stock,
&c., to be
transferred,
&c., to a
married
woman.

7. All sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England or of any other bank, and all such deposits and annuities respectively as are mentioned in the last preceding section, and all shares, stock, debentures, debenture stock, and other interests of or in any such corporation, company, public body, or society as aforesaid, which after the commencement of this Act shall be allotted to or placed, registered, or transferred

in or into or made to stand in the sole name of any married woman shall be deemed, unless and until the contrary be shown, to be her separate property, in respect of which so far as any liability may be incident thereto her separate estate shall alone be liable, whether the same shall be so expressed in the document whereby her title to the same is created or certified, or in the books or register wherein her title is entered or recorded, or not.

Provided always, that nothing in this Act shall require or authorise any corporation or joint stock company to admit any married woman to be a holder of any shares or stock therein to which any liability may be incident, contrary to the provisions of any Act of Parliament, charter, byelaw, articles of association, or deed of settlement regulating such corporation or company.

Sect. 7 casts upon the husband the burden of proof that stock so registered is not separate property: (*Re Browne*; *Anderson v. Browne*, 82 L. T. 284.)

8. All the provisions hereinbefore contained as to deposits in any post office or other savings bank, or in any other bank, annuities granted by the Commissioners for the Reduction of the National Debt or by any other person, sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England or of any other bank, shares, stock, debentures, debenture stock, or other interests of or in any such corporation, company, public body, or society as aforesaid respectively, which at the commencement of this Act shall be standing in the sole name of a married woman, or which, after that time, shall be allotted to, or placed, registered, or transferred to or into, or made to stand in, the sole name of a married woman, shall respectively extend and apply, so far as relates to the estate, right, title, or interest of the married woman, to any of the particulars aforesaid which, at the commencement of this Act, or at any time afterwards, shall

Investments
in joint names
of married
women and
others.

be standing in, or shall be allotted to, placed, registered, or transferred to or into, or made to stand in, the name of any married woman jointly with any persons or person other than her husband.

As to stock, &c., standing in the joint names of a married woman and others.

9. It shall not be necessary for the husband of any married woman, in respect of her interest, to join in the transfer of any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society as aforesaid, which is now or shall at any time hereafter be standing in the sole name of any married woman, or in the joint names of such married woman and any other person or persons not being her husband.

Fraudulent investments with money of husband.

10. If any investment in any such deposit or annuity as aforesaid, or in any of the public stocks or funds, or in any other stocks or funds transferable as aforesaid, or in any share, stock, debenture, or debenture stock of any corporation, company, or public body, municipal, commercial, or otherwise, or in any share, debenture, benefit, right, or claim whatsoever in, to, or upon the funds of any industrial, provident, friendly, benefit, building, or loan society, shall have been made by a married woman by means of moneys of her husband, without his consent, the court may, upon an application under section seventeen of this Act, order such investment, and the dividends thereof, or any part thereof, to be transferred and paid respectively to the husband; and nothing in this Act contained shall give validity as against creditors of the husband to any gift, by a husband to his wife, of any property, which, after such gift, shall continue to be in the order and disposition or reputed ownership of the husband, or to any deposit or other investment of moneys of the husband made by or in the

name of his wife in fraud of his creditors; but any moneys so deposited or invested may be followed as if this Act had not passed.

11. A married woman may by virtue of the power of making contracts hereinbefore contained effect a policy upon her own life or the life of her husband for her separate use; and the same and all benefit thereof shall enure accordingly.

Moneys payable under policy of assurance not to form part of estate of the insured.

A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts: Provided, that if it shall be proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive, out of the moneys payable under the policy, a sum equal to the premiums so paid. The insured may by the policy, or by any memorandum under his or her hand, appoint a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof, and for the investment of the moneys payable under any such policy. In default of any such appointment of a trustee, such policy, immediately on its being effected, shall vest in the insured and his or her legal personal representatives, in trust for the purposes aforesaid. If, at the time of the death of the insured, or at any time afterwards, there shall be no trustee, or it shall be expedient to appoint a new trustee

13 & 14 Vict
c. 60.

or new trustees, a trustee or trustees or a new trustee or new trustees may be appointed by any court having jurisdiction under the provisions of the Trustee Act, 1850, or the Acts amending and extending the same. The receipt of a trustee or trustees duly appointed, or, in default of any such appointment, or in default of notice to the insurance office, the receipt of the legal personal representative of the insured shall be a discharge to the office for the sum secured by the policy, or for the value thereof, in whole or in part.

Since this Act a petition for appointment of trustees of the proceeds of a life policy effected by a husband under the Act of 1870 ought to be entitled in the matter of the Trustee Acts and in the matter of the Act of 1882: (*Re Soutar's Policy Trust*, 50 L. T. Rep. N. S. 262; 26 Ch. Div. 236). The court will not appoint a single trustee where the fund is retained on behalf of infants: (*Re Howson's Policy*, 80 L. T. 95; W. N. 1885, p. 213.) In several cases some difficulty has been experienced in dividing the policy money among the wife and children where the trusts have not been clearly stated. In *Seyton v. Satterthwaite* (56 L. T. Rep. N. S. 479; 34 Ch. Div. 511), where the policy taken out under the Act of 1870, was "for the benefit of the wife and children," it was held, upon Originating Summons, that they took as joint tenants. For article on insurance under the M. W. P. Act, 1870, see 83 L. T. 120.

Remedies of
married
woman for
protection
and security
of separate
property.

12. Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any indictment or other proceeding under this section it shall be sufficient to allege such property to be her property; and in any proceeding under this section a husband or wife shall be competent

to give evidence against each other, any statute or rule of law to the contrary notwithstanding: Provided always, that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife.

Actions between Husband and Wife, &c.

In *Re Symonds v. Hallett* (49 L. T. Rep. N. S. 380; 24 Ch. Div. 346) an interim injunction was granted to restrain a husband from entering upon possession of his wife's house; and see *Weldon v. de Bathe* (14 Q. B. Div. 339, *ante*, p. 256). But she cannot take criminal proceedings against her husband for a personally defamatory libel: (*Reg. v. Lord Mayor of London*, 54 L. T. Rep. N. S. 761; 16 Q. B. Div. 772.)

A husband may sue his wife for money lent after marriage, or paid after marriage at her request, whether the request was made before or after marriage: (*Butler v. Butler*, 54 L. T. Rep. N. S. 591; 16 Q. B. Div. 374, C. A.) In *Re Butterfield and Mott* (77 L. T. 194) it was held that a plaintiff, by making his wife a defendant in an administration action, had admitted the property to be separate estate. The Act has not deprived the husband of his rights of proceeding against his wife in respect of her separate estate: (*Butler v. Butler*, *ubi sup.*) Notwithstanding the exception in sect. 12 as to spouses suing in tort, a husband who is a defendant may enforce the undertaking in damages of his wife being plaintiff: (*Hunt v. Hunt*, 54 L. J. 289, Ch.; W. N. 1884, p. 243.) As to separation allowance agreed to be paid to wife, see *Baker v. Baker* (75 L. T. 304, County Court.)

In any such criminal proceeding against a husband or a wife as is authorised by this Act, the husband and wife respectively shall be competent and admissible witnesses, and except when defendant, compellable to give evidence (47 & 48 Vict. c. 14, s. 1), passed subsequently to *Reg. v. Brittleton* (50 L. T. Rep. N. S. 276; 12 Q. B. Div. 266). As to whether a married woman charged jointly with another with larceny on the property of a husband can give evidence on her own behalf, see *Anonymous case* (85 L. T. 410).

Wife's ante-nuptial debts and liabilities.

13. A woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage, including any sums for which she may be liable as a contributory, either before or after she has been placed on the list of contributories, under and by virtue of the Acts relating to joint stock companies; and she may be sued for any such debt and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and, as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts, or wrongs, and for all damages or costs recovered in respect thereof: Provided always, that nothing in this Act shall operate to increase or diminish the liability of any woman married before the commencement of this Act for any such debt, contract, or wrong, as aforesaid, except as to any separate property to which she may become entitled by virtue of this Act, and to which she would not have been entitled for her separate use under the Acts hereby repealed or otherwise, if this Act had not passed.

Husband to be liable for his wife's debts contracted before marriage to a certain extent.

14. A husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her, before marriage, including any liabilities to which she may be so subject under the Acts relating to joint stock companies as aforesaid, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bonâ fide* recovered against him in

any proceeding at law, in respect of any such debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage as aforesaid; but he shall not be liable for the same any further or otherwise; and any court in which a husband shall be sued for any such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, or value of such property: Provided always, that nothing in this Act contained shall operate to increase or diminish the liability of any husband married before the commencement of this Act for or in respect of any such debt or other liability of his wife as aforesaid.

Costs of marriage settlement were ordered to be paid out of trust fund, it being submitted that the husband was not liable by reason of sect. 14: (*De Staepoole v. De Staepoole*, 84 L. T. 98; 37 Ch. Div. 139.)

In *Downe v. Fletcher and Wife* (59 L. T. Rep. N. S. 180; 21 Q. B. Div. 11; 36 W. R. 694; 52 J. P. 375) it was held that in an action against husband and wife to recover a debt contracted by the wife *before* marriage, where the marriage had taken place between the passing of the M. W. P. Acts of 1874 and 1882, the judgment could be entered against the wife under Order XIV., r. 1, to be recovered out of separate estate, with a limitation as to execution similar to that in *Scott v. Morley* (see p. 256) without proof of existence of separate estate at date of judgment.

15. A husband and wife may be jointly sued in respect of any such debt or other liability (whether by contract or for any wrong) contracted or incurred by the wife before marriage as aforesaid, if the plaintiff in the action shall seek to establish his claim, either wholly or in part, against both of them; and if in any such action, or in any action brought in respect of any such debt or liability against the husband alone, it is not found that the husband is liable in respect of any property of the wife so acquired by him or to which he shall have become so entitled as aforesaid, he shall have judgment for his costs

Suits for
ante-nuptial
liabilities.

of defence, whatever may be the result of the action against the wife if jointly sued with him; and in any such action against husband and wife jointly, if it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally and against the wife as to her separate property; and, as to the residue, if any, of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only.

Act of wife
liable to
criminal pro-
ceedings.

16. A wife doing any act with respect to any property of her husband, which, if done by the husband with respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this Act, shall in like manner be liable to criminal proceedings by her husband.

Questions
between
husband and
wife as to
property to
be decided in
a summary
way.

17. In any question between husband and wife as to the title to or possession of property, either party, or any such bank, corporation, company, public body, or society as aforesaid in whose books any stocks, funds, or shares of either party are standing, may apply by summons or otherwise in a summary way to any judge of the High Court of Justice in England or in Ireland, according as such property is in England or Ireland, or (at the option of the applicant irrespectively of the value of the property in dispute) in England to the judge of the County Court of the district, or in Ireland to the chairman of the Civil Bill Court of the division in which either party resides, and the judge of the High Court of Justice or of the County Court, or the chairman of the Civil Bill Court (as the case may be) may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be

made in such manner as he shall think fit: Provided always, that any order of a judge of the High Court of Justice to be made under the provisions of this section shall be subject to appeal in the same way as an order made by the same judge in a suit pending or on an equitable plaint in the said court would be; and any order of a County or Civil Bill Court under the provisions of this section shall be subject to appeal in the same way as any other order made by the same court would be, and all proceedings in a County Court or Civil Bill Court under this section in which, by reason of the value of the property in dispute, such court would not have had jurisdiction if this Act or the Married Women's Property Act, 1870, had not passed, may, at the option of the defendant or respondent to such proceedings, be removed as of right into the High Court of Justice in England or Ireland (as the case may be), by writ of *certiorari* or otherwise as may be prescribed by any rule of such High Court; but any order made or act done in the course of such proceedings prior to such removal shall be valid, unless order shall be made to the contrary by such High Court: Provided also, that the judge of the High Court of Justice or of the County Court, or the chairman of the Civil Bill Court, if either party so require, may hear any such application in his private room: Provided also, that any such bank, corporation, company, public body, or society as aforesaid, shall, in the matter of any such application for the purposes of costs or otherwise, be treated as a stakeholder only.

Applications under this section, unless made in a pending matter, will be by Originating Summons.

For form see Dan. F. 2286.

For example of an application under this section by motion in divorce proceedings, see *Phillips v. Phillips* (59 L. T. Rep. N. S. 183; 13 P. Div. 220; 57 L. J. P. 76; 52 J. P. 407).

18. A married woman who is an executrix or administratrix alone or jointly with any other person or persons

Married woman as an executrix or trustee.

of the estate of any deceased person, or a trustee alone or jointly as aforesaid of property subject to any trust, may sue or be sued, and may transfer or join in transferring any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society in that character, without her husband, as if she were a *feme sole*.

Married Woman Executrix or Trustee.

It is observable that this section makes no mention of land; accordingly a doubt has arisen whether a married woman trustee can convey trust land, except by deed acknowledged. See Lewin on Trusts, 8th edit., p. 36 note, and *Re Docwra*; *Docwra v. Faith* (53 L. T. Rep. N. S. 288; 29 Ch. Div. 693).

It is convenient to put the words "on her separate receipt" in an order for payment out of money to a married woman as trustee: (*Re Hawksworth*, 83 L. T. 80; W. N. 1887, p. 113.)

Saving of
existing
settlements,
and the power
to make
future settle-
ments.

19. Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument; but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors.

Exemption of Settlements from Act.

A marriage settlement made in 1882 contained an agreement for settlement of after-acquired property, except interests settled to separate use, and after the M. W. P. Act the wife became entitled to a bequest without mention of separate use. Held, that sect. 19 applied and the property must be settled: (*Re Stonor's Trusts*, 48 L. T. Rep. N. S. 963; 24 Ch. Div. 195.) This case was followed and approved by the Court of Appeal in *Re Whitaker; Christian v. Whitaker* (56 L. T. Rep. N. S. 34; 34 Ch. Div. 227).

In *Hancock v. Hancock* (58 L. T. Rep. N. S. 49) the settlement was not executed by the wife, but the money was her share in the residuary personalty of her mother, and had been carried over to the separate account of the wife and her assignees in administration action. It was held both by Mr. Justice North and the Court of Appeal (58 L. T. Rep. N. S. 906; 38 Ch. Div. 78; 57 L. J. 396, Ch.; 36 W. R. 417) to be bound by the settlement.

This section is not retrospective in favour of creditors, so as to enable them to issue execution against property settled before the Act with restraint on anticipation: (*Smith v. Whitelock*, 55 L. J. 286, Q. B.)

"With respect to the 19th section I entertain no doubt that the whole of the latter part relates to settlements made after the passing of this Act, and has no operation on settlements which were in existence at the time the Act was passed": (per Mr. Justice Wills in *Beckett v. Tasker*, 56 L. T. Rep. N. S. 636; 19 Q. B. Div. 7, 12.)

In *Re Quade's Trusts* (53 L. T. Rep. N. S. 74; W. N. 1884, p. 225) it was held by Mr. Justice Chitty that, to bring a settlement within sect. 19, it must be one made by and binding upon the married woman. The general effect of sect. 19 in connection with bankruptcy proceedings was discussed by the Divisional Court in *Re Emma Armstrong; Ex parte Gilchrist*. Their decision was reversed by the Court of Appeal without any opinion being given as to the point under discussion with reference to sect. 19: (55 L. T. Rep. N. S. 538; 17 Q. B. Div. 167, 521.) But in *Re Armstrong; Ex parte Boyd* (59 L. T. Rep. N. S. 806; 21 Q. B. Div. 264; 57 L. J. 553, Q. B.; 36 W. R. 772, C. A.) where real property was by marriage settlement vested in a trustee for a married woman for life for her separate use without restraint on anticipation, with remainder to such persons as she might appoint, with remainder in default of appointment; it was held (Lord Esher dissenting) that on the married woman who traded separately from her husband becoming bankrupt, the trustee in bankruptcy in claiming the life estate was not interfering with or affecting the settlement within sect. 19 of this Act, and that it passed to him under the

bankruptcy under sect. 1, sub-sect. 5 of the Act. See also *Re Onslow's Settlement*; *Plowden v. Gayford* (59 L. T. Rep. N. S. 308; 39 Ch. Div. 622; 57 L. J. 940, Ch.; 36 W. R. 883).

We may call attention to *Bower v. Smith* (24 L. T. Rep. N. S. 118; 11 Eq. 279; 40 L. J. 194, Ch.; 19 W. R. 399), where the effect of a covenant for settlement was evaded by the lady appointing in sums under 500*l.*, which was the limit prescribed by the covenant.

Married woman to be liable to the parish for the maintenance of her husband.

20. Where in England the husband of any woman having separate property becomes chargeable to any union or parish, the justices having jurisdiction in such union or parish may, in petty sessions assembled, upon application of the guardians of the poor, issue a summons against the wife, and make and enforce such order against her for the maintenance of her husband out of such separate property as by the 33rd section of the Poor Law Amendment Act, 1868, they may now make and enforce against a husband for the maintenance of his wife if she becomes chargeable to any union or parish. Where in Ireland relief is given under the provisions of the Acts relating to the relief of the destitute poor to the husband of any woman having separate property, the cost price of such relief is hereby declared to be a loan from the guardians of the union in which the same shall be given, and shall be recoverable from such woman as if she were a *feme sole* by the same actions and proceedings as money lent.

31 & 32 Vict. c. 122.

Married woman to be liable to the parish for the maintenance of her children.

21. A married woman having separate property shall be subject to all such liability for the maintenance of her children and grandchildren as the husband is now by law subject to for the maintenance of her children and grandchildren: Provided always, that nothing in this Act shall relieve her husband from any liability imposed upon him by law to maintain her children or grandchildren.

Repeal of 33 & 34 Vict. c. 93.

22. The Married Women's Property Act, 1870, and the Married Women's Property Act, 1870, Amendment

Act, 1874, are hereby repealed: Provided that such repeal shall not affect any act done or right acquired while either of such Acts was in force, or any right or liability of any husband or wife, married before the commencement of this Act, to sue or be sued under the provisions of the said repealed Acts or either of them, for or in respect of any debt, contract, wrong, or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of this Act. 37 & 38 Vict.
c. 50.

Repeal of Acts of 1870, 1874, with Savings.

The object of sect. 22 is to save rights acquired under the M. W. P. Acts, 1870, 1874, and it does not extend to the rights of the husband, which existed independently of those Acts: (per Fry, L.J. in *Weldon v. Winslow*, 51 L. T. Rep. N. S. 643; 13 Q. B. Div. 784, 789.) In *Re Soutar's Policy* (50 L. T. Rep. N. S. 262; 26 Ch. Div. 236) Mr. Justice Pearson doubted "whether sect. 10 of the Act of 1870 remained in force for any purpose."

23. For the purposes of this Act the legal personal representative of any married woman shall in respect of her separate estate have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living. Legal representative of
married woman.

24. The word "contract" in this Act shall include the acceptance of any trust, or of the office of executrix or administratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit committed by any married woman being a trustee or executrix or administratrix either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration. The word "property" in this Act includes a thing in action. Interpretation of terms.

See *Re Ayres*, ante, p. 256.

Commence-
ment of Act.

25. The date of the commencement of this Act shall be the first of January one thousand eight hundred and eighty-three.

Extent of Act.

26. This Act shall not extend to Scotland.

Short title.

27. This Act may be cited as the Married Women's Property Act, 1882.

CHAPTER XX.

MISCELLANEOUS STATUTES.

ARBITRATION AND AWARD.

WHERE the reference is to a single arbitrator if the parties fail to appoint an arbitrator, or the parties or arbitrators fail to appoint an umpire, and in certain other cases, a judge may appoint one on summons: (C. L. P. Act, 1854 (17 & 18 Vict. c. 125), s. 12.)

If the reference were in a pending action the application would be by ordinary summons; in other cases by Originating Summons: (see Dan. F., p. 928, note (q).)

For form of summons see Dan. F., 2125.

For text of sects. 12-15 of the C. L. P. Act, 1854, see Wilson, note to Order XXXVI., r. 10, 7th edit., p. 292.

Where a reference is to two arbitrators and one party fails to appoint, the other party may appoint arbitrator to act alone; but the court or judge may revoke such appointment: (C. L. P. Act, 1854, s. 13.)

For form of summons to revoke such appointment, see Dan., F. 2124.

As to sect. 13, see *Re Fraser and Co. v. Ehrensperger and Eckenstein* (49 L. T. Rep. N. S. 646, C.A.; 12 Q. B. Div. 310).

Under certain circumstances the court may enlarge time for making an award: (C. L. P. Act, 1854, s. 15.)

For form of summons, see Dan. F. 2129.

Where by a submission in writing the time within which the award was to be made was fixed at one month, and the submission contained no power to enlarge the time, and the award was in fact made after the expiration of the month; it was held that the court had power, subsequently to the making of the award, to enlarge the time under sect. 15 of the Common Law Procedure Act, 1854: (*Re May and Harcourt*, 13 Q. B. Div. 688.)

For practice generally under the statutes relating to arbitration, see Dan. 2188, *et seq.*

BURIAL ACTS.

By the Burial Act, 1852 (15 & 16 Vict. c. 85), s. 29, it is enacted as follows:

Provided always, that any burial board under this

Act, with the approval of the vestry and of the guardians of the poor of the parish (if any), and of the Poor Law Board (a) may from time to time appropriate for the purposes of a burial ground for such parish, either alone or jointly with any other parish or parishes, any land vested in such guardians, or in the churchwardens, or in the churchwardens and overseers (b) of the parish, or in any feoffees, trustees, or others, for the general benefit of the parish, or for any specific charity: Provided always that where any land so taken and appropriated shall be subject to any charitable use, such lands shall be taken on such conditions only as the Court of Chancery in the exercise of its jurisdiction over charitable trusts shall appoint and direct.

Applications under this section are by Originating Summons: (see Dan. F., p. 881, note (t).)

For form of summons, see Dan. F. 2044.

This statute originally only applied to the metropolis; but, by 16 & 17 Vict. c. 134, s. 7, all the sections of the Act from sect. 10 to sect. 42 (both inclusive), and sects. 44, 50, 51, 52 were made applicable to England generally.

The sanction of the Charity Commissioners to the making of the application is necessary: (*Ex parte the Watford Burial Board*, 27 L. T. Rep. 316; 2 Jur. N. S. 1045). See Mitcheson's Charity Commission Acts, 101.

For practice generally, see Dan. 2063.

A somewhat similar power is given to the councils of boroughs by the Burials Act, 1854 (17 & 18 Vict. c. 87), s. 11, which is as follows:

“ It shall be lawful for the council of any borough to appropriate for the purposes of this Act any land belonging to the body corporate of such borough, or vested in any feoffees, trustees, or others, for the general benefit of the borough, or for any specific charity: Provided always, that where any land so

(a) Now the Local Government Board.

(b) See 59 Geo. 3, c. 12, s. 17, and Steer's Parish Law, 4th edit., by Macnamara, pp. 115, 332.

appropriated shall be subject to any charitable use, such land shall be taken on such conditions only as the Court of Chancery, in the exercise of its jurisdiction over charitable trusts, shall appoint and direct."

The terms "borough" and "council of any borough" used in this section have an extended meaning by virtue of the Burials Act, 1857 (20 & 21 Vict. c. 81), s. 29.

THE CONSOLIDATED FUND (PERMANENT CHARGES
REDEMPTION) ACT, 1873.

(36 & 37 VICT. c. 57.)

Sect. 2 enacts that:

"Where any annuity (as defined by this Act) (a) is charged on and payable out of the Consolidated Fund of the United Kingdom, or moneys provided by Parliament, either in perpetuity or for a period not determinable with the life of the individual to whom the same is for the time being payable, the Treasury may at any time contract for the redemption of the same or any part thereof by payment out of moneys provided by Parliament of a capital sum not exceeding such sum as would, according to the average price of Government securities at the date of such contract, purchase an amount of Government securities yielding annual dividends equal to the amount of such annuity.

"In entering into any such contract, the Treasury shall have regard to the contingency (if any) of the determination of the annuity, and may surrender such contingency upon such terms as they may think reasonable.

"Where the person to whom such annuity is for the time being payable is a limited owner, the contract made for the redemption of the annuity shall not be valid unless it is assented to, if such limited owner is an Ecclesiastical Corporation in England, by the Ecclesiastical

(a) This includes "pensions" but not Government securities, &c., see sect. 7.

Commissioners for England, and in any other case by the Court of Chancery (*a*), but when so assented to shall be binding on the heirs, successors, executors, and administrators of such limited owner, and all other persons interested in the annuity."

Redemption money for annuities payable to Ecclesiastical Corporations are to be paid to the Ecclesiastical Commissioners: (sect. 3.) As to these see also 45 & 46 Vict. c. 72, s. 23.

In other cases where the owner of the annuity is a limited owner the redemption money *shall*, and where the owner is not a limited owner *may*, be paid into court to an account, intituled *ex parte* the owner of the annuity in the matter of the Act: (sect. 3.)

If the annuity (being one not payable to an Ecclesiastical Corporation) does not exceed 5*l.* a year, *or* the sum payable for redemption does not exceed 100*l.*, the assent of the court is not necessary, and the money need not be paid into court, but the person entitled for the time being may give a receipt: (sect. 4.)

The Act provides for difficulties as to title, and declares that any power vested by this Act in the court may be exercised by a (Chancery) judge sitting at chambers. Annuities may be redeemed by transfer of Government securities instead of cash: (sect. 5.)

A return of transactions under this Act is to be laid before Parliament annually: (sect. 6.)

The term "limited owner" means a corporation (aggregate or sole), tenant in tail or for life, a married woman entitled in her own right, a guardian, a committee of a lunatic or idiot, a trustee for any purpose (charitable or other), an executor or administrator, and any person entitled to any less interest in an annuity than a tenancy for life: (see sect. 7, which contains other definitions.)

Applications under this Act are by Originating Summons: (see Dan. F., p. 979, note (*i*.)

For form of summons, see Dan. F. 2220.

By 46 Vict. c. 1, s. 2, advances of redemption money may be made to the Treasury by the National Debt Commissioners, and repaid by terminable annuities. And by 46 & 47 Vict. c. 55, s. 18 the Treasury may contract directly with the Charity Commissioners for the redemption of annuities payable for charitable purposes, and the redemption money may be paid or securities transferred to the official trustees of charitable funds.

(a) Now the Chancery Division.

THE COUNTY COURTS ACT, 1888.

51 & 52 VICT. c. 43. (a)

By this Act the old County Court Acts have been repealed, and the law consolidated and amended.

In the following instances applications by summons, which it is conceived is properly termed "Originating," may be made in connection with proceedings in the County Courts.

1. Where in an action of ejectment in the County Court, lands of greater annual value than 50*l.* would be affected by the judgment, for removal into the High Court (s. 59).

2. In an action or matter under the equitable jurisdiction of the court (s. 67) application may be made to allow it proceed in the County Court although above 500*l.* (s. 68).

3. Generally for removal of action or matter into the High Court on terms.

4. Prohibition.

5. For removal of judgment into High Court for execution.

The power of removal when a defence or counterclaim is beyond the jurisdiction of an inferior court (Judicature Act, 1873, s. 90; Judicature Act, 1884, s. 18) applies to a County Court, and is not taken away by this Act.

Such an application for removal is made by Summons: (see Wilson, p. 60, and Form (Q. B. Div.) in Chitty's Forms, 12th edit., 798.)

1. *Ejectment.*

Sect. 59 of the County Courts Act, 1888, is as follows:

All actions of ejectment, where neither the value of the lands, tenements, or hereditaments, nor the rent payable in respect thereof, shall exceed the sum of fifty pounds by the year, may be brought and prosecuted in the court of the district in which the lands, tenements, or hereditaments are situate; provided that the defendant in any such action of ejectment, or his landlord, may within one month from the day of service of the summons, apply to a judge of the High Court at chambers for a summons to the plaintiff to show cause why such action should not be tried in the High Court on the

(a) For rules under this Act, see *Law Times*, 2nd Feb., 1889.

ground that the title to lands or hereditaments of greater annual value than fifty pounds would be affected by the decision in such action ; and on the hearing of such summons, the judge of the High Court, if satisfied that the title to other lands would be so affected, may order such action to be tried in the High Court, and thereupon all proceedings in the court in such action shall be discontinued.

The application will be made by summons. For Form (Q. B. Div.), see Chitty's Forms, p. 799, 12th edit.

2. *Equitable Jurisdiction.*

Sects. 67 and 68 of the Act are as follows :

67. The court shall have and exercise all the powers and authority of the High Court in the actions or matters hereinafter mentioned ; that is to say,

1. By creditors, legatees (whether specific, pecuniary, or residuary) devisees (whether in trust or otherwise), heirs-at-law, or next of kin, in which the personal or real or personal and real estate against or for an account or administration of which the demand may be made shall not exceed in amount or value the sum of five hundred pounds :
2. For the execution of trusts in which the trust estate or fund shall not exceed in amount or value the sum of five hundred pounds :
3. For foreclosure or redemption or for enforcing any charge or lien, where the mortgage, charge, or lien shall not exceed in amount the sum of five hundred pounds :
4. For specific performance of or for the reforming, delivering up, or cancelling of any agreement for the sale, purchase, or lease of any property, where in the case of a sale or purchase the purchase money, or in the case of a lease the value

of the property, shall not exceed the sum of five hundred pounds :

5. Under the Trustees Relief Acts, or under the Trustee Acts, or under any of such Acts, in which the trust estate or fund to which the action or matter relates shall not exceed in amount or value the sum of five hundred pounds :
6. Relating to the maintenance or advancement of infants in which the property of the infant shall not exceed in amount or value the sum of five hundred pounds :
7. For the dissolution or winding-up of any partnership in which the whole property, stock, and credits of such partnership shall not exceed in amount or value the sum of five hundred pounds :
8. Actions for relief against fraud or mistake in which the damage sustained or the estate or fund in respect of which relief is sought shall not exceed in amount or value the sum of five hundred pounds :

In all such actions or matters the judge shall, in addition to the powers and authorities possessed by him have all the powers and authorities, for the purposes of this Act, of a judge of the Chancery Division of the High Court ; and the treasurer, registrar, and high bailiff respectively shall in all such actions or matters discharge any duties which an officer of the said division can discharge, either under the order of a judge of the said division, or under the practice thereof, and all officers of the courts shall, in discharging such duties, conform to any rules or orders made in that behalf under this Act.

68. If during the progress of any action or matter under the last preceding section it shall be made to appear to the judge that the subject-matter exceeds the limit in point of amount to which the jurisdiction of the

court is therein limited, it shall not affect the validity of any order already made, but it shall be the duty of the judge to direct the action or matter to be transferred to the Chancery Division of the High Court; and the whole of the procedure in the said action or matter when so transferred shall be regulated by the rules of the Supreme Court: Provided always, that it shall be lawful for any party to apply to a judge of the said division at chambers for an order authorising and directing the action or matter to be carried on and prosecuted in the County Court, notwithstanding such excess in the amount of the limit to which equitable jurisdiction is given by the said section; and the judge, if he shall deem it right to summon the other parties, or any of them, to appear before him for that purpose, after hearing such parties, or on default of the appearance of all or any of them, shall have full power to make such order.

The application under sect. 68 will be made by Originating Summons.

The form given at Dan. F. No. 1914 will suffice, only reference must be made to 51 & 52 Viet. c. 43, instead of 28 & 29 Viet. c. 99.

If request for transfer to the High Court is made to the County Court judge, he may make the transfer forthwith, if not requested the order for transfer shall not be made before fifteen days at least: (County Court Rules, 1889, Order XXXIII., r. 5.) This enables any party to apply by Originating Summons as above: (Dan., p. 1916.) As to transmission of documents from the County Court, see County Court Rules, 1889, Order XXXIII., r. 7.

It will be noticed that the relief under sub-sect. 4 of sect. 67, is enlarged by the Act of 1888, and that sub-sect. 8 is altogether new.

3. *Removal of action or matter into the High Court on terms.*

Sect. 126 of the Act is as follows:

126. It shall be lawful for the High Court or a judge thereof to order the removal into the High Court, by writ of *certiorari* or otherwise, of any action or matter

commenced in the court under the provisions of this Act if the High Court or a judge thereof shall deem it desirable that the action or matter shall be tried in the High Court, and upon such terms as to payment of costs, giving security, or otherwise, as the High Court or a judge thereof shall think fit to impose.

Or otherwise.—This appears to authorise applications by Originating Summons. See also sect. 129.

Applications could formerly have been made by Originating Summons either under sect. 3 of the County Courts Act, 1865 (Equitable Jurisdiction) or on special terms under the general common law jurisdiction: (9 & 10 Vict. c. 95, s. 90; 19 & 20 Vict. c. 108, s. 38). See Dan. 1913-1915 and Dan. F. Nos. 1906, 1907. Compare Crown Office Rules, 1886, No. 28.

For transmission of documents, &c., from County Court to High Court, see County Court Rules, 1889, Order XXXIII., r. 7.

4. *Prohibition.*

Sect. 127 of the Act is as follows:—

127. It shall be lawful for any judge of the High Court, as well during the sittings as in vacation, to hear and determine applications for writs of prohibition to any court and to make such orders for the issuing of such writs as might have been made by the High Court, and all such orders so made by any such judge of the High Court shall have the same force and effect as heretofore.

128. When an application shall be made to the High Court or a judge thereof for a writ of prohibition addressed to any court, the matter shall be finally disposed of by order, and no declaration or further proceedings in prohibition shall be allowed. Upon any such application the judge of the court shall not be served with notice thereof, and shall not, except by the order of a judge of the High Court be required to appear, or be heard thereon, and shall not, except by such order, be liable to any order for the payment of the costs thereof; but the application shall be proceeded with and heard in the same manner in all respects as

any case of an appeal duly brought from a decision of a judge; and notice thereof shall be given to or served upon the same parties as in any case of an order made or refused by a judge in a matter within his jurisdiction, as the case may be.

Apparently an application requiring a person to show cause why writ of prohibition should not issue may be made by Originating Summons. See Dan. 1646; Dan. F. 1654; and Crown Office Rules 1886, rr. 81, 82.

See Dan. 1645 for previous enactments.

As to effect of grant of order or summons to show cause why a writ of prohibition or *certiorari* should not issue, see County Courts Act, 1888, s. 129.

5. *Removal of Judgments into High Court for Execution.*

SECT. 151 of the Act is as follows:—

151. If a judge of the High Court shall be satisfied that a party against whom judgment for an amount exceeding twenty pounds, exclusive of costs, has been obtained in a County Court, has no goods or chattels which can be conveniently taken to satisfy such judgment, he may, if he shall think fit, and on such terms as to costs as he may direct, order a writ of *certiorari* to issue to remove the judgment of the County Court into the High Court, and when removed it shall have the same force and effect, and the same proceedings may be had thereon, as in the case of a judgment of the High Court; but no action shall be brought upon such judgment.

This reproduces, in effect, the provisions of sect. 49 of the County Courts Act, 1856 (19 & 20 Viet. c. 108). See Dan. 1917-18.

The application may be by Originating Summons. See Dan. F. p. 829, note (t).

For form of summons see Dan. F. 1915.

THE DEFENCE ACTS, 1842, 1860, AND 1864.

(5 & 6 VICT. c. 94; 23 & 24 VICT. c. 112; 27 & 28 VICT. c. 89).

These Acts, as amended by 18 & 19 Vict. c. 117 and 22 & 23 Vict. c. 21, enable payment into court of compensation for land taken for the defence of the realm from persons under disability, &c., where the sum is 200*l.* or more. For a detailed account of these Acts and the practice thereunder see Dan. 2219-2222.

In the Government Index to the Statutes they will be found indexed under the title "War Department 3," edit. 1887, p. 1222.

Original applications under these Acts are by Originating Summons. See Dan. F. p. 948, note (*d*).

For forms see Dan. F. 2168, 2170.

FORFEITURE FOR TREASON AND FELONY
ABOLITION ACT, 1870.

(33 & 34 VICT. c. 23).

Sect. 28 of this Act is as follows :—

"It shall be competent for Her Majesty's Attorney-General or other the chief law officer of the Crown for the time being in any part of Her Majesty's dominions, or for any person who (if such convict were dead intestate) would be his heir-at-law or entitled to his personal estate or any share thereof under the Statutes of Distribution or otherwise, or for any person authorised by Her Majesty's Attorney-General or by such chief law officer as aforesaid in that behalf to apply in a summary way to any court which (if such convict were dead) would have jurisdiction to entertain a suit for the administration of his real or personal estate to issue a writ of summons calling upon any administrator or interim curator of the property of such convict appointed under this Act, or any person who without legal authority shall have possessed himself of any part of the property of such convict to account for his receipts and payments in respect of the property of such convict in such manner as such court shall direct; and it shall be lawful

for such court thereupon to issue such writ of summons, and to enforce obedience thereto, and to all orders and proceedings of such court consequent thereon in the same manner as in any other case of process lawfully issuing out of such court, and such court shall thereupon have full power, jurisdiction, and authority to take all such accounts, and to make and give all such orders and directions as to it shall seem proper or necessary for the purpose of securing the due and proper care, administration, and management of the property of such convict, and the due and proper application of the same and of the income thereof, and the accumulation and investment of such balances, if any, as may from time to time remain in the hands of any such administrator or interim curator, or other person as aforesaid in respect of such property; and so long as any such proceeding shall be pending in any such court every such administrator or interim curator or other person shall act in the exercise of all powers vested in him under this Act, or otherwise in all respects as such court shall direct, and it shall be lawful for such court (if it shall think fit) to authorise and direct any act to be done by any such interim curator which might competently be done by an administrator duly appointed under this Act."

Applications under this section are by Originating Summons. See Dan. F. p. 972, note (d)

For form of summons, see Dan. F. 2207.

For practice under this Act, see Dan. 99.

HOUSING OF THE WORKING CLASSES ACT, 1885.

(48 & 49 VICT. c. 72.)

Sect. 5, sub-sect. 3, of this Act is as follows:—

Where an arbitrator has under the Artizans' and Labourers' Dwellings Improvement Acts, 1875 to 1882, determined the amount of compensation, an appeal shall

not lie to a jury from the decision of such arbitrator without leave of the High Court of Justice, but such court or any judge thereof at chambers may grant such leave upon application in a summary manner, and upon being satisfied that a failure of justice will take place if the leave is not granted.

This application may be made by summons.

By sect. 11, the Settled Land Act, 1882, shall be amended as follows :

(a) [This enables sales, &c., of land for the benefit of the working classes to be made at a reduced rate.]

(b) The improvements on which capital money may be expended, enumerated in sect. 25 of the said Act, and referred to in sect. 30 of the said Act, shall, in addition to cottages for labourers, farm servants, and artizans, whether employed on the settled land or not, include any dwellings available for the working classes, the building of which in the opinion of the court is not injurious to the estate.

The application to the court will be made on summons under the Settled Land Act, see p. 200.

IMPROVEMENT OF LAND ACTS.

The Land Commissioners (see 45 & 46 Vict. c. 38, s. 48, *ante*, p. 221) have power to sanction improvements in land, and charge the costs on the land, under the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114). Sect. 30 of the S. L. Act, 1882 (45 & 46 Vict. c. 38), extends the lists of improvements under sect. 9 of the Act of 1864 (27 & 28 Vict. c. 114) so as to comprise those mentioned in sect. 25 of the S. L. Act, 1882, see *ante*, p. 205. The erection of a mansion-house and appurtenances, and permanent improvements of the same are, by virtue of the Limited Owners Residences Acts (33 & 34 Vict. c. 56; 34 & 35 Vict. c. 84), already included in the improvements which may be effected under the Act of 1864. But they are not included in those authorised by the S. L. Act, 1882. The construction of reservoirs for supply of water to the property, &c., is also an improvement within the Act of 1864 by virtue of 40 & 41 Vict. c. 31.

Compare sect. 25 (xiii.), (xviii.), of the S. L. Act, 1882.

In case of any dissent from any application to the commissioners for their sanction of proposed improvements, the landowner desiring such improvements may apply to a judge in chambers in the Chancery Division for an order authorising the commissioners to proceed upon the application notwithstanding such dissent: (see sect. 21 of the Improvement of Land Act, 1864, as altered by the Settled Land Act, 1882, s. 64, *ante*, p. 233.)

Applications under that section are by Originating Summons.

See Dan. F., p. 950, note (l).

For form of summons see Dan. F. 2172.

For practice see further Dan. p. 2223.

INFERIOR COURTS (REMOVAL FROM). (a)

As to these see Dan. 1919-1924.

Mayor's Court of the City of London.

Under certain circumstances the leave of a judge of the High Court is requisite for the removal of causes into the High Court from the Mayor's Court, which leave unless applied for in a proceeding already pending in the Superior Court is obtainable by Originating Summons: (Dan. F., p. 831, note *w*.)

For form of summons, see Dan. F. 1921.

For form of summons for writ of *certiorari* to remove action or suit in the Mayor's Court, see Dan. F. 1922.

As to period for lodging writ for removal, see *Prim v. Smith* (58 L. T. Rep. N. S. 606, Ct. of App.; Q. B. Div.).

Other Inferior Courts.

For form of Originating Summons to remove a judgment or order of an inferior court into the High Court, see Dan. F. 1929.

For form of Originating Summons for *certiorari* to remove judgment for the purpose of having execution, see Dan. F. 1931.

LAND CHARGES REGISTRATION AND SEARCHES ACT, 1888.

(51 & 52 VICT. c. 51.)

24th Dec. 1888.

"The object of the Land Charges Registration and Searches Act, 1888, which came into operation on the 1st Jan. 1889, is to

(a) Removals from County Courts are treated separately, p. 281.

protect purchasers of estates in land by enabling them to discover the existence of charges created by process of execution under judgments and orders of court, and of other charges in the Act called 'land charges,' created by virtue of land improvement and similar Acts, or Acts enabling sanitary authorities and other public bodies to impose such charges on lands and buildings." (See Messrs. Elphinstone and Clark's Pamphlet on the Act (being an appendix to their learned work, *On Searches*), p. 1.)

By sect. 4 of the Act "land charge" is defined as follows: "Land charge means a rent, or annuity, or principal moneys payable by instalments or otherwise, with or without interest charged otherwise than by deed upon land under the provisions of any Act of Parliament for securing to any person either the moneys spent by him, or the costs, charges, and expenses incurred by him under such Act, or the moneys advanced by him for repaying the moneys spent, or the costs, charges, and expenses incurred by another person under the authority of an Act of Parliament, and a charge under the 35th section of the Land Drainage Act, 1861, or under the 29th section of the Agricultural Holdings (England) Act, 1883, but does not include a rate or scot."

By sect. 14, "the registration of a land charge may be vacated pursuant to an order of the High Court of Justice, or any judge thereof."

Certain rules have been made under the Act, see W. N., Jan. 12, 1889, p. 32; 86 L. T. 211; but they do not appear to give any directions as to applications to the court or judge.

It is apprehended that an application to a judge to vacate the registration of a land charge will be by Originating Summons.

LAND REGISTRY ACT, 1862.

(25 & 26 VICT. c. 53.)

No new application for registration under this Act can now be entertained (38 & 39 Vict. c. 87, s. 125); but the Act itself is not altogether superseded by the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), or obsolete. Certain applications may be made by Originating Summons (see 25 & 26 Vict. c. 53, s. 134). For form, see Dan. Forms, 2nd edit. (1871) 2183. For practice, see Dan. 5th edit. 1946-1957; and for brief account of the Act, see Dan. 2234, and for fees see W. N. Jan. 26, 1889.

The following cases have been decided with reference to this Act: *Re Kennard* (11 Jur. N. S. 27), Originating Summons; *Bradish v. Ellames* (10 L. T. Rep. N. S. 89), petition; *Re T. Richardson* (25

L. T. Rep. N. S. 12; L. Rep. 12 Eq. 398; *ib.* 13 Eq. 142; 40 L. J. 616, Ch.), Originating Summons; *Re Winter* (27 L. T. Rep. N. S. 842; L. Rep. 15 Eq. 156), Originating Summons; and *Re Drew; Mason's Claims* (14 L. T. Rep. N. S. 278; L. Rep. 2 Eq. 206; L. Rep. 1 Ch. App. 126); *Re The Land Transfer Act*, 1862, and a *Conveyance from Parkes to Searles* (85 L. T. 47, May 19, 1888, and W. N. 1888, p. 110); and see comment in 85 L. T. 78, June 2, 1888.

LAND TRANSFER ACT, 1875.

(38 & 39 VICT. c. 87.) (a)

This Act is intended "to make further provision for the simplification of the title to land, and for facilitating the transfer of land in England."

It establishes a land registry, and enables registration with either absolute or possessory title (sect. 5).

The definition of land contained in 13 & 14 Vict. c. 21 (Lord Brougham's Act) is excluded (sect. 4).

For the practice under this Act, see the General Rules of the 24th Dec., 1875; W. N. Jan. 15, 1876; summarised in Dan. 2276, 2279; and the General Rules of the 1st Jan., 1889 (W. N. Jan. 12, 1889; 86 L. T. 208). See also Schedule of Fees in certain cases, and registry note in W. N. Supp. Jan. 26, 1889, p. 68; 86 L. T. 247.

"All applications to the Court and appeals from the registrar shall be by summons" (rule 59 of Dec. 1875).

Rule No. 7 (*k*) of the 1st Jan. 1889, enables the registrar to modify the General Rules (made previously) with reference to "land now or hereafter to be transferred from the register kept under the Transfer of Land Act, 1862."

THE MORTGAGE DEBENTURE ACT, 1865

(28 & 29 VICT. c. 78),

AND

THE MORTGAGE DEBENTURE AMENDMENT ACT, 1870

(33 & 34 VICT. c. 20).

These statutes enable the issue by companies of mortgage debentures.

(a) See Holt on this Act. The subject of "Registration of Title" including this Act is fully discussed in a series of articles in the *Law Times*, in the months of May, June, and July, 1886.

tures founded on mortgages or charges on land registered and deposited at the Land Registry Office.

If the company makes default in procuring the discharge from the company's debentures at the proper time the person entitled to redeem may apply to the Court (Chancery Division) by summons, calling upon the company to show cause why such security is not discharged, and the judge may make the necessary orders: (33 & 34 Vict. c. 20, s. 9.) Applications under this section are by Originating Summons: (see Dan. F. p. 957, note *r.*)

A mortgage debenture holder of the company may, in certain cases obtain the appointment of a receiver on petition or summons. See sects. 40, 47, of 28 & 29 Vict. c. 78.

For practice under these Acts see Dan. p. 2237.

For form of Originating Summonses thereunder, see Dan. F. 2184 and 2186.

MORTMAIN AND CHARITABLE USES ACT, 1888.

(51 & 52 VICT. c. 42.)

13th Aug. 1888.

This Act (sect. 5) gives power, in certain cases, to the High Court or the proper officer to order enrolment of deeds which have not been enrolled in due time. The text of the section is as follows:

5. (1.) Where an instrument, the enrolment whereof is required under this part of this Act for the validation of an assurance, is not duly enrolled within the requisite time, Her Majesty's High Court of Justice, or the officer having control over the enrolment of deeds in the central office, may, on application in such manner and on payment of such fee as may be prescribed by rules of the Supreme Court, and on being satisfied that the omission to enrol the instrument in proper time has arisen from ignorance or inadvertence, or through the destruction or loss of the instrument by time or accident, and that the assurance was of a nature to be validated under this section, order or cause the instrument to be enrolled.

(2.) Thereupon, if the assurance to be validated was made in good faith and for full and valuable consideration, and was made to take effect in possession immediately from the making thereof without any power of

revocation, reservation, condition, or provision, except such as is authorised by this Act, and if at the time of the application possession or enjoyment was held under the assurance, then enrolment in pursuance of this section shall have the same effect as if it had been made within the requisite time :

(3.) Provided that if at the time of the application any proceeding for setting aside the assurance, or for asserting any right founded on the invalidity of the assurance, is pending, or any decree or judgment founded on such invalidity has been then obtained, the enrolment under this section shall not give any validity to the assurance.

(4.) Where the instrument omitted to be enrolled in proper time has been destroyed or lost by time or accident and the trusts thereof sufficiently appear by a copy or abstract thereof or some subsequent instrument, such copy, abstract, or subsequent instrument may be enrolled under this section in like manner and with the like effect as if it were the instrument so destroyed or lost.

(5.) An application under this section may be made by any trustee, governor, director, or manager of, or other person entitled to act in the management of or otherwise interested in, any charity or charitable trust intended to be benefitted by the uses declared by the instrument to be enrolled.

The above section is substantially a consolidation of sect. 3 of 27 Vict. c. 13, sects. 1 and 2 of 29 & 30 Vict. c. 57, and sect. 13 of 35 & 36 Vict. c. 24, which are respectively repealed by the above Act, but, as Mr. Tyssen (p. 557) points out, the above section is slightly more extensive in so far as it expressly authorises the enrolment of a copy or abstract of a deed.

Previously to this Act the application to the court under the repealed sections was by Originating Summons, and presumably the rules will continue this practice. But of course no summons was necessary when the Clerk of Enrolments enrolled the deed under sect. 13 of 35 & 36 Vict. c. 24.

For the old statutes and practice, see Tudor L. C. in Real Pro-

perty, 3rd edit., notes to *Corbyn v. French*, 549-553; Dan. 2064, and for old form, see Dan. F. 2046.

For the practice under the above sect. 5 of the new Act the rules when they appear, must be consulted. For the general law, relative to charitable bequests, see Mr. Tyssen's recent and valuable work.

The following brief summary of the new statute may be useful. Summary.

The object of the Act is to consolidate and amend the law relating to mortmain and the disposition of land for charitable uses, but though this Act repeals 9 Geo. 2, c. 36 (except so much of sect. 5 as is unrepealed) and thirteen other statutes, besides portions of two more, it leaves unrepealed and unconsolidated a very large number of statutes which provide exemptions from the general laws restraining dispositions for charities, &c. It is well known that these exemptions have grown up on no definite principle, and need revision. However, the present Act is a distinct reform of the statute law on the subject, and will make further reform practicable. Part I. of the new Act relates to "mortmain," and declares that "land" shall not be "assured" to or for, or be acquired by or on behalf of, any corporation in mortmain, except by a licence from the Queen or by statute, under penalty of forfeiture to the Queen, saving the rights of mesne lords (sect. 1). The Queen may grant licences in mortmain (sect. 2); and forfeiture of land is not to affect rents or services due therefrom (sect. 3). It should be observed that in this Act "land" usually includes all hereditaments "and any estate and interest in land" (sect. 10 (iii.)). Part II. deals with charitable uses. Subject to the exceptions in the Act, assurances of land, or of personalty to be laid out in land, for charitable uses, are void, except made in accordance with the requirements of the Act. These may be briefly summarised as follows: They provide for immediate possession (sub-sect. (2)); prohibit revocation, reservation, &c. (sub-sect. (3)), with some exceptions (sub-sect. (4)); but

Summary of
new *Mortmain*
Act.

allow payment of a rentcharge on a *bonâ fide* sale (sub-sect. (5)). Also, whatever the property (except stock in the public funds or copyhold or customary land) the assurance must be by deed with two witnesses (sub-sect. (6)). If it is land or personalty other than stock in the funds, unless the assurance is made for full value it must be made a year before the assurator's death (sub-sect. 7). If it is of stock in the funds it must be transferred in the public books six months before the transferor's death, except the transfer is made for full value (sub-sect. (8)). If it is land, or personalty, other than stock in the funds, the assurance must be enrolled within six months after execution, or in certain cases of land another instrument declaring the charitable uses must be enrolled instead (sub-sect. (9)). In case of inadvertent omissions, &c., enrolment may by leave be made of assurances on sales when no action is pending, &c., after the prescribed time (sect. 5). The next part relates to exemptions. "Public parks," "elementary schools," "school houses," and "public museums," are privileged, and it should be observed that each of the expressions "public parks," &c., receives a wide definition (sub-sect. (4)). Any quantity of land may be given or sold for such objects, and a limited amount—twenty acres for a park, two acres for a museum, and one acre for a school-house—may be devised. And personalty may be left for such objects. But the will or deed (except made for full value) is to be executed at least a year before death, or must reproduce in substance a similar devise so executed, and must be enrolled in the books of the Charity Commissioners within six months after the testator's death, or the execution of the deed (sect. 6). Gifts to the Universities of Oxford, Cambridge, London, Durham, the Victoria University, or any of the colleges or houses of learning within them, or for the foundation scholars of Eton, Winchester, and Westminster, or for Keble

College, are exempted (sect. 7 (i.). Sales of land, not exceeding two acres, to trustees, &c., for religious purposes, education, art, literature, science, &c., are exempted (sect. 7 (ii.). After these exemptions comes a general saving for all cases where any statute wholly or partially excludes the Mortmain Acts (sect. 8). This preserves the provisions of the Church Building Acts, the privileges of various hospitals, &c. Part IV. is styled "supplemental." Assurances required to be made by deed and enrolled may be made under the Land Transfer Act, 1875, instead (sect. 9). Sect. 10 contains the definitions. The Act does not apply to Scotland or Ireland (sect. 11). Charters, licences, and customs enabling land to be held in mortmain are saved (sect. 12). Various statutes are repealed with savings, and the preamble of 43 Eliz. c. 4, is reprinted (sect. 13).

THE NATIONAL DEBT (CONVERSION) ACT, 1888.

(51 VICT. c. 2.)

27th March, 1888.

This Act provided for the conversion into new stock of a lower denomination and redemption of New Three per Cent. Stock, and for the conversion of consols and reduced stock into such new stock (sects. 1—10); but as the time for so doing expired on the 1st Sept. 1888, it is considered unnecessary to print the portions of the Act relating thereto here, notwithstanding, sect. 3 of the National Debt (Supplemental) Act, 1888 (51 & 52 Vict. c. 15), which see. [Sects. 11—13 relate to "Ways and Means;" and sects. 14—18 to Stock Certificates, Savings' Banks, Duchy of Lancaster, and Power to a Holder to have more than one account.]

The following sections, being of general utility, are printed here, though they are but slightly germane to "Originating Summons."

19. A power or direction, whether subject or not to Powers of investment. any restrictions or conditions, to invest in any of the stocks which may be converted or exchanged under this Act, or generally in Three per Cent. Stock, shall extend

to authorise an investment subject to the same conditions and restrictions (if any) in new stock.

Provisions as
to annuitants

20. (1.) Where under any trust or arrangement other than a charitable trust any stock has been appropriated to provide an annuity, and is under this Act liable to be converted into or exchanged for new stock, the person in whose name the stock is standing may, at the request of the annuitant, or, in the case of several annuitants, the majority of them, and at the expense of the annuitant or annuitants, sell the stock, and invest the proceeds either in any manner authorised by the trust or arrangement, or in any manner in which cash under the control of the High Court, or the Court of Session, may for the time being be invested, and shall not be liable for any loss arising from any such sale or investment.

(2.) In the case of stock standing in the name of Her Majesty's Paymaster-General on behalf of the Supreme Court of Judicature in England, or of the Accountant to the Court of Session in Scotland, or of the Accountant-General of the Supreme Court of Judicature in Ireland, any such sale or investment may be authorised by the High Court, or the Court of Session, as the case may be.

(3.) Where, in execution of any trust, or in performance of any duty, and whether in pursuance of the order of any court, or otherwise, any stock has been appropriated to provide an annuity, and is under this Act converted into or exchanged for new stock, the trust or duty shall, so far as relates to the payment of the annuity be deemed to be executed or performed by the payment of the dividends on the new stock; but nothing in this section shall affect any power of any court or other authority to make any order as to the application of capital in such cases.

See *Re Meacock*; *Meacock v. Meacock* (W. N. 1889, p. 9).

For the rule which now regulates the investment of cash under the control of the court, see *ante*, p. 198.

As to the last clause of sub-sect. 3 of sect. 20, see rule xvi. under this Act, *post*, p. 303.

21. (1.) An agreement to transfer any amount of New Three per Cent. Stock, Consolidated Three per Cent. Stock, or Reduced Three per Cent. Stock, or generally any amount of Three per Cent. Stock, may be satisfied by making a transfer of an equal amount of new stock.

Provisions as to stock mortgages.

(2.) Where under any mortgage or agreement for a loan any person is bound to pay half-yearly sums equal to the dividends on any specified amount of stock, and that amount of stock is under this Act converted into or exchanged for new stock, the obligation shall be satisfied by the payment of quarterly sums equal to the dividends on the same amount of new stock.

22. Where any New Three per Cent. Stock, Consolidated Three per Cent. Stock, or Reduced Three per Cent. Stock is standing in the names of more than two persons as joint holders thereof, the dissent or assent of the majority of those joint holders shall be sufficient for the purposes of this Act.

Power for majority of joint holders to dissent or assent.

23. A power of attorney given exclusively for the purpose of empowering the attorney to signify any dissent or assent authorised by this Act shall be exempt from stamp duty.

Exemption of certain powers of attorney from stamp duty.

24. The power by this Act given to the Lord Chancellor and Lord Chancellor of Ireland respectively to make regulations, shall extend to any funds in court to the credit of lunatics so found by inquisition in England and Ireland respectively, including committees' security accounts.

Provision as to lunacy funds.

25. (1.) Where any stock is converted into or exchanged for new stock, the new stock, and the dividends thereon, shall be subject to the same trusts, charges, rights, distringas, and restraints as affect the

Application to new stock of trusts, powers, &c., affecting old stock.

stock so converted or exchanged, and the dividends thereon respectively, and all powers of attorney, requests as to dividends, and other documents relating to the stock so converted or exchanged, and the dividends thereon, or either of them, shall apply to the new stock, and the dividends thereon respectively.

(2.) In any Act passed or instrument executed before the passing of this Act references to any stock liable to be converted or exchanged in pursuance of this Act may, if the stock is so converted or exchanged, be construed as references to new stock, and in the case of any testamentary instrument executed before the passing of this Act, any disposition, which, but for the passing of this Act, would have operated as a specific bequest of any such stock, shall if the same is so converted or exchanged be construed as a specific bequest of such new stock, and if the same is not so converted, but is paid off or redeemed, shall be construed as a pecuniary legacy of a sum of money equal to the nominal amount of the stock so paid off or redeemed.

Indemnity to
trustees.

26. Persons who are by this Act, or by rules under this Act authorised to signify their dissent from the conversion of stock, or to exchange or consent to the exchange of stock, shall not be liable for any loss resulting from their not signifying such dissent, or from their making such exchange or giving such consent; and trustees and other persons acting in a fiduciary character are hereby expressly authorised to make such exchange or give such consent.

Re-invest-
ment by
trustees.

27. When any stock, converted or exchanged by virtue of this Act into new stock, is held by a trustee, such trustee shall be at liberty to sell the same, and to invest the proceeds arising from such sale in any of the securities for the time being authorised for the investment of cash under the control of the High Court not-

withstanding anything to the contrary contained in the instrument creating the trust.

See 51 & 52 Vict. c. 15, s. 8, as to Scotch Trusts.

28 (1). If by reason of the conversion or exchange of any stock in pursuance of this Act any question arises as to the powers or duties of any trustee, executor, or administrator, or other person acting in a fiduciary character, or as to the application of the dividends or capital of any stock, and in particular as to the cases in which, and extent to which, capital may be applied towards meeting any deficiency in income, the High Court in England or Ireland, or the Court of Session in Scotland, on the application of the trustee, executor, or administrator, or other person as aforesaid, or of any person interested in the stock, may by order determine the question.

Application to court in respect of questions arising out of conversion or exchange.

(2.) In the case of a charity in England or Wales, subject to the provisions of the Charitable Trusts Acts, 1853 to 1887, the like orders may be made by the Charity Commissioners for England and Wales, either on their own motion or on application, and nothing in this section shall authorise an application to the High Court in the matter of such a charity without a certificate from those commissioners.

A testatrix by her will directed the trustees thereof to invest a fund forming part of her estate, in the purchase of Three per Cent. Consols, but gave them no power to vary or change the investment when made. Out of the income of the consols the trustees were directed to pay certain annuities, and after the deaths of the annuitants, the trust fund was to go over. The fund was duly invested.

It was stated that the effect of accepting conversion under this Act would be to considerably reduce the annuities, as they were payable out of income and not out of capital. The trustees were desirous of at once selling out the stock and reinvesting the proceeds of sale in securities authorised by law as trust investments, and asked by petition for the opinion and direction of the court whether they would, under the circumstances, be justified in taking that course.

Chitty, J. held that, having regard to sect. 8 (1) and sects. 26 and 27 of the Act, the trustees might sell the consols and reinvest at once in authorised securities : (*Re Tuckett's Trusts*, W. N. 1888, p. 89. and 58 L. T. Rep. N. S. 719.) The application in that case was by petition, but it is submitted that it might properly have been made by Originating Summons.

Rules were issued under this Act, entitled "The Conversion Act (Funds) Rules, 1888." Such of these rules as are now in vogue are here printed. Rules 2-14 relate to conversion of stock already effected, or to steps to be taken within a time now past. See Wilson, p. 781.

All these rules are in W. N., 7th April, 1888, p. 155, Supp., and 84 L. T. 414.

Conversion Act (Funds) Rules, 1888.

Rule I. In the rules of this order and in all orders of the court and certificates dealing with or referring to new stock created under the said Act, such new stock shall be sufficiently described by the term "New Consols." And in these rules the term "Original Stock" shall mean any sum of New Three per Cent. Stock, Consolidated Three per Cent. Stock, and Reduced Three per Cent. Stock, which shall be exchanged for New Consols.

General Directions.

Rule XV. The New Consols received in exchange for Original Stock shall be placed by the paymaster to the same credit as that to which such original stock was standing and such New Consols and the dividends thereon, including as part of such dividends the consideration money of 5s. for every hundred pounds of stock mentioned in sect. 10 of the said Act, shall, unless otherwise ordered, be dealt with in the same manner as such original stock and the dividends thereon were directed to be dealt with, except that any investment or accumulation shall be made in New Consols. All stop orders, charging orders, powers of attorney, and other documents relating to the original stock or the dividends thereon shall apply to such New Consols or the dividends thereon.

Rule XVI. Where the dividends on New Consols shall be insufficient to make the payments by any order or upon any authority directed to be made out of the dividends on the original stock, the whole of such dividends shall be applied, so far as the same will extend, towards making such payments but without prejudice to any application which may be made under sect. 20 of the Act to make up the deficiency out of capital.

Rule XVII. Where such original stock as is referred to in the last preceding rule has been appropriated to provide an annuity of an amount equal to the dividends thereon, the paymaster shall, without any order for that purpose, upon a memorandum signed by a registrar, master in lunacy, or chief clerk, in the form D in the schedule hereto, with such alterations as the circumstances may require, sell from time to time so much of any New Consols exchanged therefor or any other securities in which the Original Stock may have been reinvested as with the dividends thereon will raise the amount required for any periodical payment for such annuity after deducting the income tax on such dividends.

Rule XVIII. The paymaster may signify his assent, notwithstanding any stop order or charging order affecting any consols or reduced annuities, and without the consent of the persons named in such stop order or charging order.

Rule XIX. No court fee shall be charged upon any summons, order, certificate, affidavit, or other document or proceeding required for the purpose of giving effect to these rules.

Rule XX. All provisions in the Supreme Court Funds Rules, 1886, as to the exchange of Government securities and transactions with the National Debt Commissioners shall apply to New Consols.

Rule XXI. Notwithstanding these rules the court or a judge may, if circumstances shall require, make

a special order relating to conversion of any original stock in any cause or matter.

Rule XXII. In these rules, "the Act" means the National Debt (Conversion) Act, 1888, and "paymaster" means Her Majesty's Paymaster-General on behalf of the Supreme Court of Judicature. Expressions in these rules have the same meanings as in the Act.

Rule XXIII. These rules may be cited as the Conversion Act (Funds) Rules, 1888.

Schedule.

Forms A, B, and C, are omitted as being no longer available. (See Wilson, 782.)

FORM D.

Short Title of Cause or Matter as in the order
Ledger Credit (as in Paymaster's Books).

£ New Consols.

The (*describe the old stock*) which have been exchanged for the above-mentioned New Consols, having been, by the order dated the day of , appropriated to provide an annuity of 40*l.* a year for A. B. in the said order named by half-yearly payments of 20*l.* as in the said order mentioned the paymaster is directed at the time fixed for each periodical payment of such annuity to sell so much of the New Consols as with the dividends then applicable for such payment will raise such sum of 20*l.* after deducting from such sum the income tax which has been deducted on such dividends, and to pay the amount raised by such sale to the said A. B.

Dated this day of , 1888.
 (Signed)

Memorandum.—*Judge's Directions to Chief Clerks in reference to Rule XVII.*

1. *Service.*—(a) It will be sufficient to serve the summons in the first instance only on the trustees or trustee,

executors or executor, or if there is no trustee or executor, or the trustees or trustee, executors or executor cannot, without difficulty or expense, be found or ascertained, then on some person interested in the corpus of the fund; (b) Where there is a stop order, the summons should also be served on the person entitled to the benefit of the order and the service should be accompanied with a tender of 13s. 4d. and an intimation that if he appear it will be at his own risk as to costs.

BY THE NATIONAL DEBT REDEMPTION ACT, 1889.

(52 VICT. C. 4.)

11th April, 1889.

Provision is made for redemption of Consolidated Three per Cent. Stock, and Reduced Three per Cent. Stock, on the 6th July, 1889: (sect. 1.) Also for exchange of such stock for Two-and-Three-quarters per Cent. Consolidated Stock or Local Loans Stock: (sect. 3.)

The following provisions of the National Debt Conversion Act), 1888, *supra*, are made applicable to exchanges of stock under this Act, viz., sects. 16 (2), 20 (1), (2), (3), 21 (2), 22, 25 (1), (2), 26, 27, 28 (1), (2): (sect. 9). In the case of stock in court, the Lord Chancellor, with the approval of the Treasury, may make regulations as to how, with consent of the person to whom the dividends are payable, payment or exchange may be effected under this Act. If the dividends are being accumulated the consent required under this section is to be the consent of a judge of the High Court: (sect. 10.) A trustee may give a consent under this section: (*ib.*)

In the case of stock in court the Treasury may make regulations, with consent as aforesaid, to continue to pay interest at three pounds per cent. per annum up to the 5th April, 1890. In case of stock in court the regulations shall be made with concurrence of the Lord Chancellor, and where the dividends are being accumulated the consent under this section is to be the consent of a judge of the High Court: (sect. 12.)

For rules under this Act, see W. N., 29th June, 1889, p. 317, Supp. and Pay Office Rules, *Ib.*, p. 318. See also The National Debt Act, 1889, 52 Vict. c. 6.

NEWCASTLE CHAPTER ACT, 1884.

(47 & 48 VICT. c. 33.)

This Act (sect. 11) enables the court (under certain circumstances) to authorise persons administering the estates of deceased persons who have promised contributions to the Newcastle Bishopric, or Chapter Endowment Funds, to pay the whole or part of such contributions. Subject to any rules of court the application may be made by summons.

PAROCHIAL CHARITIES (CITY OF LONDON)
ACT, 1883.

(46 & 47 VICT. c. 36.)

By sect. 10, any person claiming any such vested interest as therein mentioned may apply to the High Court by petition or summons: (see *Re The Parish of St. Edmund the King and Martyr*, 60 L. T. Rep. N. S. 622.)

See also Mitcheson, 335, where the Act is set out.

POLEHAMPTON ESTATES ACT, 1885.

(48 & 49 VICT. c. 40.)

As to proceedings under this Act, and summons, see sect. 5.

THE RAILWAY COMPANIES ACT, 1867.

(30 & 31 VICT. c. 127.)

This Act protects from execution the rolling stock and plant of railway companies, and provides for appointment of a receiver on petition of a judgment creditor: (sect. 4.) Where property of the company has been taken in execution, and a question arises whether it is liable to be so taken, such question will be determined by summons in the court out of which execution was issued: (sect. 5.) This will not be an Originating Summons. See rule 32 of Order of 24th January, 1868, L. Rep. 3 Ch. App. xxxv. When a railway company is unable to meet its engagements with its creditors, the directors may file a scheme of arrangement: (sect. 6.) After the scheme is filed the court may, on the application of the company on summons or motion in a summary way, restrain actions against the company: (sect. 7.) After publication in the *Gazette* of notice of filing of scheme, no execution, attachment, or other process

against the property of the company, shall be available without leave of the court to be obtained on summons or motion in a summary way: (sects. 8, 9.)

A judgment creditor gains no priority by obtaining a receivership order under this Act: (*Re Mersey Railway Company*, 37 Ch. Div. 610; 58 L. T. Rep. N. S. 745.) A dock company authorised to make a railway is a railway company within the meaning of this Act. *Re The East and West India Dock Company*; *Clark v. The East and West India Dock Company* (58 L. T. Rep. N. S. 715.)

Applications under sect. 7 being made in a pending action are by ordinary summons. But applications under sect. 9, if not made in a pending action, would, it is conceived, be by Originating Summons.

For practice, see Dan. 2174 *et seq.*

For form of summons, under sect. 5, see Dan. F. 2100, under sect. 7, see Dan. F. 2111, and under sect. 9, Dan. F. 2112.

THE STANNARY COURT.

For the benefit of the unlearned reader, we cite the following from Mr. Rawson's well-known Pocket Law Lexicon:—"Stannary, a tin mine. There are stannary courts in Devonshire and Cornwall for the administration of justice among the miners. They are courts of record resembling the palatine courts. The judge is called a vice-warden. By the Judicature Act, the appeal is to the Court of Appeal."

By 18 & 19 Vict. c. 32, s. 10, it is enacted in effect that where any decrees or orders on the equity side of the Court of the Vice-Warden, whether for payment of money or otherwise, cannot be conveniently or effectually enforced by the ordinary process of the Court of the Vice-Warden, within the jurisdiction thereof, the Court of Chancery (now the Chancery Division) or any judge thereof, sitting in court or at chambers, upon the application of a party entitled to the benefit of such decree or order, upon such evidence as in this section mentioned, may make the decree or order, or so much thereof as cannot be enforced, a decree or order of the High Court of Chancery (now the Chancery Division) which may be enforced as

though the same had been originally made by that court.

See Dan. 847.

The application may be made on motion or by Originating Summons.

See Dan. F. p. 371, note (b). *

For form, see Dan. F. 931.

As to analogous applications in actions on the common law side of the Stannary Court, see 18 & 19 Vict. c. 32, s. 9.

For form, see Dan. F. 930.

For list of Acts affecting the Stannaries Court, see the Government Index to the Statutes, edit. 1887, p. 1085. See also the Stannaries Act, 1887 (50 & 51 Vict. c. 43) which came into operation on the 1st Dec. 1887.

General Orders of the Vice Warden, the 2nd July, 1884, made with the consent of the Lord Chief Justice of England under 18 & 19 Vict. c. 32, s. 23, in lieu of all existing general orders and rules (except an order of the 20th March, 1857, relating to procedure on bills of exchange and promissory notes) are published by authority by Netherton and Worth, printers, of Truro (price 10s. 6d.).

The powers of the Court of the Lord Warden are transferred to the Court of Appeal: (Jud. Act, 1873, s. 18.)

The reader may refer to the following cases on the Stannaries Court, but the effect of legislation subsequent to the cases mentioned must be considered:—*Re West Devon Great Consols*, 38 Ch. Div. 51 (Stannaries Act, 1869, 32 & 33 Vict. c. 19, s. 32); *Re North Molton Mining Company* (W. N. 1886, p. 78, Companies Act, ss. 81, 141—Jurisdiction), and cases under title "Company—Cost Book Company," in L. Rep. Dig. 1865-1880, p. 1005, *ib.* 1881-85, p. 382. See also Report of Select Committee, Parl. Paper, 1887, 245, 252.

TRADE MARKS ACTS, 1883 to 1888.

(46 & 47 VICT. c. 57; 49 & 50 VICT. c. 37; 51 & 52 VICT. c. 50.)

The only applications to which we have occasion to refer are certain ones with reference to trade marks, viz:

1. Opposition to Registration.
2. Rectification of the register by the court.
3. Alteration of registered mark.

As to actions relating to trade marks generally, see Dan. 1476-1493, as modified by the Table of Alterations to that work, pp. ccxxvii. and ccxxviii.

For Trade Mark Rules now in force, see supplement to W. N., 5th Jan. 1884, p. 1, and rules of 1888 in Lawson, p. 482. It is believed that some new rules will shortly appear.

The Act of 1883 is called the "Principal Act," and the sections of that Act are here referred to unless otherwise stated.

Part IV. of the Act (ss. 62-81) relates specially to Trade Marks; but see also Part V. which relates to trade marks and other matters. The principal Act was considerably altered by the Act of 1888. Sect. 62 authorised the comptroller to register a trade mark, and prescribed the mode of application and appeals. Sect. 63 limited the time for proceeding, and sect. 64 declared the conditions of registration and defined a trade mark.

But sects. 62, 63 are altered by sects. 8, 9 of the Act of 1888, and sect. 64 is repealed by sect. 10 of the Act of 1888, and the following section substituted:

"64. (1.) For the purposes of this Act, a trade mark Definition of
trade mark. must consist of or contain at least one of the following essential particulars:

- "(a) A name of an individual or firm printed, impressed, or woven in some particular and distinctive manner; or
- "(b.) A written signature or copy of a written signature of the individual or firm applying for registration thereof as a trade mark; or
- "(c.) A distinctive device, mark, brand, heading, label, or ticket; or
- "(d.) An invented word or invented words; or
- "(e.) A word or words having no reference to the character or quality of the goods, and not being a geographical name.

"(2.) There may be added to any one or more of the essential particulars mentioned in this section any letters, words, or figures, or combination of letters, words, or figures, or of any of them, but the applicant for registration of any such additional matter must state in his application the essential particulars of the trade mark, and must disclaim in his application any right to the exclusive use of the added matter, and a copy of the

statement and disclaimer shall be entered on the register.

“(3.) Provided as follows:

“(i.) A person need not under this section disclaim his own name or the foreign equivalent thereof, or his place of business, but no entry of any such name shall affect the right of any owner of the same name to use that name or the foreign equivalent thereof:

“(ii.) Any special and distinctive word or words, letter, figure, or combination of letters or figures, or of letters and figures used as a trade mark before the thirteenth day of August one thousand eight hundred and seventy-five may be registered as a trade mark under this part of this Act.”

Sect. 10 of the Act of 1888 is not retrospective with reference to marks applied for before 1st Jan., 1889: (*Re Burgoyne's T. M.*, W. N. 9th March, 1889, p. 53; 86 L. T. 350.)

As to connection of trade mark with goods, registration of a series of marks, colour, and advertisement of application, see sects. 65-68 of the Act of 1883, and the modifications made by sects. 11, 12 of the Act of 1888.

1. *Opposition to Registration.*

The following is the text of sect. 69 of the Act of 1883 as altered by sect. 13 of the Act of 1888.

69. (1.) Any person may, within one month, or such further time not exceeding three months, as the comptroller may allow, of the advertisement of the application, give notice in duplicate at the Patent Office of opposition to registration of the trade mark, and the comptroller shall send one copy of such notice to the applicant.

(2.) Within one month after receipt of such notice, or such further time as the comptroller may allow, the applicant may send to the comptroller a counter-state-

ment in duplicate of the grounds on which he relies for his application, and, if he does not do so, shall be deemed to have abandoned his application.

(3.) If the applicant sends such counter-statement the comptroller shall furnish a copy thereof to the person who gave notice of opposition, and shall, after hearing the applicant and the opponent, if so required, decide whether the trade mark is to be registered, but his decision shall be subject to appeal to the Board of Trade, who shall, if required, hear the applicant and the opponent and the comptroller, and may make an order determining whether, and subject to what conditions (if any), registration is to be permitted.

(4.) The Board of Trade may, however, if it appears expedient, refer the appeal to the court, and in that event the court shall have jurisdiction to hear and determine the appeal, and may make such order as aforesaid.

(5.) If the applicant abandons his application after notice of opposition in pursuance of this section he shall be liable to pay to the opponent such costs in respect of the opposition as the comptroller may determine to be reasonable.

(6.) Where the opponent is out of the United Kingdom he shall give the comptroller an address for service in the United Kingdom.

As to sect. 69 of the Act of 1883 see *Re Australian Wine Importers Limited and Mason, Re the Trade Mark "Golden Fleece"* (60 L. T. Rep. N. S. 436; 41 Ch. Div. 278.)

For Form of Summons that registration of trade mark may be proceeded with notwithstanding opposition, see Dan. F. 1563, p. 671.

Rule 29 of the Trade Marks Rules, 1883, which is as follows, seems obsolete by sect. 13 of the Act of 1888. See Lawson, p. 462.

29. [*Manner of bringing case before court.*] (1.) Where a case stands for the determination of the court, under the provisions of sect. 69 of the said Act, the comptroller

shall require the applicant within one month, or such further time as the comptroller may allow, to issue a summons in the chambers of a judge of Her Majesty's High Court of Justice for an order that, notwithstanding the opposition of which notice has been given, the registration of the trade mark be proceeded with by the comptroller, or to take such other proceedings as may be proper and necessary for the determination of the case by the court.

(2.) The applicant shall thereupon issue such summons, or take such other proceedings as aforesaid, within the period of one month above-named, or such further time as the comptroller may allow, and shall also within the like period give notice thereof to the comptroller.

(3.) If the applicant shall fail to issue such summons, or to take such other proceedings, of which failure the non-receipt by the comptroller of the said notice shall be sufficient proof, the applicant shall be deemed to have abandoned his application.

(4.) [*Mode of giving notice that the matter has been brought before the court.*—Such notice to the comptroller shall be given by delivering at or sending to the Patent Office a copy of the summons or other initiatory proceeding bearing an indorsement of service signed by the applicant or his solicitor, or an indorsement of acceptance of service signed by the opponent or his solicitor.

Where upon an opposition to an application to register a trade mark the case stands for the determination of the court under sect. 69 (4), the court can determine all questions arising upon the objections: (*Re Arbenz' Application*, 35 Ch. Div. 248; 55 L. T. Rep. N. S. 480.) This application was made by summons.

2. Rectification of Register by the Court.

The following is the text of sect. 90 of the Act of 1883 as amended by sect. 23 of the Act of 1888, by the insertion of the words in brackets:—

90. (1.) The court may, on the application of any person aggrieved by the omission without sufficient cause of the name of any person [or of any other particulars] from any register kept under this Act, or by any entry made without sufficient cause in any such register, make such order for making, expunging, or varying the entry, as the court thinks fit; or the court may refuse the application; and in either case may make such order with respect to the costs of the proceedings as the Court thinks fit.

(2.) The court may, in any proceeding under this section, decide any question that it may be necessary or expedient to decide for the rectification of a register, and may direct an issue to be tried for the decision of any question of fact, and may award damages to the party aggrieved.

(3.) Any order of the court rectifying a register shall direct that due notice of the rectification be given to the comptroller.

As to this section see *Re Australian, &c.*, ante, p. 311.

For form of summons for rectification of the Register of Trade Marks, see Dan. F. No. 1565, p. 672.

For form of summons for leave to register Trade Mark, see Sebastian, 2nd edit., 413.

A person whose application to register a trade mark has been refused by the comptroller cannot appeal direct to the court from such refusal, as a person aggrieved within sect. 90 (1), by the omission of his name from the register under sect. 90 of the Act, but must take the special course prescribed by sect. 62 (sub-sect. 4) of appealing to the Board of Trade from the comptroller's decision: (*Re Trade Mark "Normal"*, 35 Ch. Div. 231; 82 L. T. 318, C.A.)

For application by motion for rectification of register by adding note agreed upon between rival manufacturers: (see *Re Mitchell*, 28 Ch. Div. 666; 51 L. T. Rep. N. S. 900.)

3. *Alteration of Registered Mark.*

Sect. 92. (1.) The registered proprietor of any registered trade mark may apply to the court for leave to add to or

alter such mark in any particular, not being an essential particular within the meaning of this Act, and the court may refuse or grant leave on such terms as it may think fit.

(2.) Notice of any intended application to the court under this section shall be given to the comptroller by the applicant, and the comptroller shall be entitled to be heard on the application.

(3.) If the court grants leave, the comptroller shall on proof thereof and on payment of the prescribed fee cause the register to be altered in conformity with the order of leave.

For form of summons for leave to add to or alter a trade mark, see Dan. F. No. 1566, p. 672.

Notice to comptroller of application for alteration of trade mark, under sect. 92 of the Act, is required by rule 48.

Merchandise Marks Act, 1887.

The importance of the subject of trade marks is increased by the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28). This repeals the Merchandise Marks Act, 1862 (25 & 26 Vict. c. 88) subject to certain savings (sect. 23). It is only necessary here to set out the following small portions of the Act of 1887.

3. (1.) For the purposes of this Act—

The expression “trade mark” means a trade mark registered in the register of trade marks kept under the Patents, Designs, and Trade Marks Act, 1883, and includes any trade mark, which either with or without registration is protected by law in any British possession or foreign state to which the provisions of the 103rd section of the Patents, Designs, and Trade Marks Act, 1883, are under Order in Council for the time being applicable.

17. On the sale or in the contract for the sale of any goods to which a trade mark, or mark, or trade description has been applied, the vendor shall be deemed to warrant that the mark is a genuine trade mark, and not

Implied warranty on sale of marked goods.

forged or falsely applied, or that the trade description is not a false trade description within the meaning of this Act, unless the contrary is expressed in some writing signed by or on behalf of the vendor and delivered at the time of the sale or contract to and accepted by the vendee.

APPENDICES.

APPENDIX I.

1. ORDER AS TO SUPREME COURT FEES, 1884.

25th January, 1884.

Extract from schedule to this order.

Summons.

£ s. d.

- | | | | |
|---|---|----|---|
| 7. On sealing or issuing an Originating Summons under the Act 6 & 7 Vict. c. 73, for the taxation of a solicitor's bill of costs within twelve months after delivery, or delivery of a bill of costs by a solicitor including the order to be made thereon | 0 | 10 | 0 |
| 8. On sealing any other Originating Summons | 0 | 10 | 0 |
| 9. On amending same | 0 | 5 | 0 |

Appearances.

- | | | | |
|---|---|---|---|
| 17. On entering an appearance, for each person | 0 | 2 | 0 |
| 18. On amending same | 0 | 2 | 0 |

Judgments, Decrees, and Orders.

On drawing up and entering judgments, decrees, and orders :

- | | | | |
|---|---|----|---|
| 59. If made on the hearing of an Originating Summons, unless otherwise provided | 0 | 10 | 0 |
| 62. If made on any application by Order LV., r. 2, directed to be disposed of in chambers, comprised in sects. (1), (2), (3), (5), (6), (7), or (10) of the said rule, exclusive of those comprised in sect. (12) of the same rule | 0 | 10 | 0 |
| 65. If an order of course under the Act 6 & 7 Vict. c. 73, to tax a solicitor's bill of costs within twelve months after delivery, or for delivery of a bill of costs by a solicitor where fee No. 7 is not applicable | 0 | 10 | 0 |
| 67. On signing a note or memorandum of an order pursuant to Order LII., r. 14, when required for production where no order is drawn up | 0 | 3 | 0 |
-

2. SUPREME COURT FUNDS RULES, 1886. (a)

Order for
funds to be
brought into
court to have
a lodgment
schedule.

5. Every order which directs funds to be lodged in Court shall have annexed thereto as part thereof a schedule, to be styled the Lodgment Schedule, which shall be headed with the title of the cause or matter, the date of the order, and the title of the ledger credit to which the funds are to be placed; and shall set out in a tabular form:—

(a.) The name, or a sufficiently identifying description of the person by whom the funds are to be lodged:

(b.) The amount, if ascertained, and the description of the funds.

When an order has directed the sale of any property and the lodgment of the proceeds thereof in Court, the authority for such lodgment may be a lodgment schedule signed by a chief clerk; and such lodgment schedule shall operate in the same manner as a lodgment schedule annexed to an order.

The lodgment schedule shall be prepared upon a printed form according to the form No. 1 (b) in the appendix to these rules, and as nearly as may be in the manner shown by the specimen entries appended to such form; and may direct the investment and accumulation of the funds or the dividends or interest on the funds to be lodged; and may also direct that the funds shall not be dealt with without notice to the purchaser or other person named in such schedule.

Order for
funds to be
paid out, &c.,
to have a
payment
schedule.

6. Every order which directs funds in court to be paid, sold, transferred, or delivered, or carried over to any other ledger credit than that to which the same are standing, or to be otherwise dealt with by the Paymaster, shall have annexed thereto as part thereof a schedule, to be styled the Payment Schedule, which shall be headed with the title of the cause or matter, the date of the order, and the ledger credit to which the funds dealt with are standing. The Payment Schedule shall contain as part of the heading a statement of the funds with which, or with part of which, or with the interest or dividends on which the Paymaster is to deal, describing them if already in court as they appear in the Paymaster's certificate, or if not already in court stating the source from which they are to be derived. The Payment Schedule shall set out in a tabular form:—

(a.) The name of each person to whom a payment, transfer, or delivery of any funds is to be made: unless the name is to be stated in a certificate of a chief clerk or a master in lunacy or a taxing officer, or unless such payment, transfer, or delivery is to be made to trustees or other persons in succession, or to representatives when no probate or letters of administration shall have been taken out at the date of the order. The name shall be in full (the christian name preceding the surname) except in the case of a payment to a firm, when the business title of such firm may be stated,

(a) These rules and the forms thereunder will be found in W. N., 9th Oct., 1886, and in Wilson, p. 724, *et seq.* Only one or two of the more important rules and forms are set out here.

(b) See p. 320, *post.*

and when a payment is to be made to a person named in the schedule the address (if known at the time of preparing the schedule) of such person, or in the case of a payment to two or more persons jointly, of one of such persons, shall be stated in the schedule;

- (b.) The title of the ledger credit or separate account to which any funds are to be carried over;
- (c.) The amount and description of the funds in each case to be paid, sold, transferred, delivered, or carried over, so far as the same can be then stated; and where the actual amounts to be dealt with cannot be ascertained at the date of the order, and are not to be subsequently ascertained by any means provided for by the order or by these rules, the aliquot parts to be dealt with;
- (d.) The nature and necessary particulars of any other dealings with such funds by the paymaster.

In the body of the schedule short descriptions may be used, and it shall not be necessary to add that the specific amounts dealt with form part of the larger amount of any like funds mentioned in the heading.

The word "interest" in the schedule shall, unless otherwise specified, mean the dividends and interest on all the funds mentioned in the heading.

The Payment Schedule shall be prepared upon a printed form according to the form No. 2 (a) in the appendix to these rules, and as nearly as may be in the manner shown by the specimen entries appended to such form.

8. Every order which both directs or authorises the lodgment of funds in court and also deals with such funds or any part thereof, or with any funds already in court to the same ledger credit, shall have annexed thereto, as part thereof, a combined Lodgment and Payment Schedule, in the form No. 3 in the appendix to these rules.

103. The length of the title of any ledger credit shall not exceed thirty-six words, exclusive, in the case of a separate account in a cause or matter, of the title of the cause or matter in which such separate account is opened: Provided that such title may be extended beyond thirty-six words if a sufficient reason be assigned to the satisfaction of the Registrar or Master of the Supreme Court; and the registrar or master shall, in such case, add to the instruction to open such credit the words "notwithstanding Rule 103;" and provided also that the paymaster may extend any such title if, in his opinion, a sufficient reason be assigned for so doing. In such title four figures shall be reckoned as one word.

111. These rules shall not apply in district registries to funds in court or hereafter lodged in court. (b)

26th July, 1886.

HERSCHELL, C.

Rules not to apply to district registries.

(a) See *post*, p. 322.

(b) But see *post*, p. 324.

APPENDIX TO S. C. F. RULES, 1886.

FORM No. 1.

[*Lodgment Schedule, referred to in Rule 5.*] (a)

LODGMENT SCHEDULE.

In the High Court of Justice,
Chancery Division.

Date of order, 18 .

Title of cause or matter, 18 . A. No.

Ledger credit. [If same as title of cause, state "As above."]

Particulars of Funds to be lodged.	Person to make the lodgment.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.

[*Specimen Lodgment Schedules.*]

In the High Court of Justice,
Chancery Division.

21st July, 1886.

Re Morton, deceased, *Morton v. Matthews.* 1881. M. 391.

Ledger credit. As above.

Particulars of Funds to be lodged.	Person to make the lodgment.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Balance to be certified on passing final account as receiver.	Edmund James White (the receiver).		
Balance to be certified of the 87 <i>l.</i> 5 <i>s.</i> 9 <i>d.</i> due from him as executor after retaining his costs.	James Matthews (defendant)		

(a) *Ante*, p. 318.

In the High Court of Justice,
Chancery Division.

15th June, 1886.

A. v. B. 1883. A. 16.

Ledger credit. As above.

Particulars of Funds to be lodged.	Person to make the lodgment.	Amounts.		
		Money.	Securities.	
		£ s. d.	£	s. d.
Consols.	J. A. and J. B.		15,000	0 0
Great Western Railway 4 per cent. Debenture Stock.	Do.		1,500	0 0
Balance of cash to be certified. Invest and accumulate in Consols.	J. B.			

[*Specimen Lodgment Schedule of purchase money to be signed by a chief clerk.*]

In the High Court of Justice,
Chancery Division.

A. v. B. 1885. A. 16.

Ledger credit. The said action proceeds of sale of real estate.

LODGMET SCHEDULE.

Purchase money to be lodged pursuant to order dated 31st July, 1886.

Particulars of money to be lodged.	Person to make the lodgment.	Amount.
		£ s. d.
Deposit.	T. A., the auctioneer.	20 0 0
Balance of purchase money and interest.	W. K., the purchaser.	195 0 0
Invest and accumulate amounts lodged in Consols.		
The above funds not to be paid out, transferred, or dealt with, without notice to the said W. K.		£215 0 0

Total amount in words: Two hundred and fifteen pounds.

Dated this 10th day of August, 1886.

, Chief Clerk.

FORM NO. 2.

[*Payment Schedule referred to in Rule 6.*] (a)

PAYMENT SCHEDULE.

In the High Court of Justice,

Chancery Division.

Date of order, 18 .

Title of cause or matter,

18. A. No.

Ledger credit [if same as title of cause state "As above."]

Funds in court.

Particulars of payments, transfers, or other operations ordered.	Payees and transferees or separate accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.

[*Specimen Payment Schedules.*]

In the High Court of Justice,

Chancery Division.

2nd August, 1886.

B. v. D. 1883. B. 165.

Ledger credit. As above.

Funds in court { 730*l.* 7*s.* 7*d.* New Three per Cent. Annuities.
 { 10*l.* 13*s.* 2*d.* cash.

Particulars of payments, transfers, or other operations ordered.	Payees and transferees or separate accounts.	Amounts	
		Money.	Securities.
		£ s. d.	£ s. d.
Pay.	John Park.	5 6 7	
Sell New Three per Cent. Annuities.		730 7 7
Out of proceeds and balance of funds pay:—			
Costs of petitioners to be taxed.			
Legacy duty in respect of fund in court.			
Divide residue in fourths, and pay as under:—			
One-fourth	John Smith (petitioner)		
One-fourth	Emma Joy (petitioner), wife of Wm. Joy, on her separate receipt		
Out of one-fourth	Eliza Joy (widow).	79 10 6	
Residue of such one-fourth	Edward Sparkes.		
Carry over one-fourth.	Separate account of		
Invest and accumulate in New Three per Cent. Annuities.	William Peters (plaintiff).		

In the High Court of Justice,
Chancery Division.

4th September, 1886.

Smith v. Williams. 1871. S. 103.

Ledger credit. The said cause. Trust legacy of 800*l.* for Charles Pearce and Susan his wife and their children and incumbrancers.

Funds in court { 308*l.* 4*s.* 1*d.* Consolidated Three per Cent. Annuities.
512*l.* 11*s.* New Three per Cent. Annuities.
50*l.* money on deposit.
48*l.* 1*s.* 3*d.* cash.

Particulars of payments, transfers, or other operations ordered.	Payees and transferees or separate accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Sell Consols.			308 4 1
Sell New Three per Cent. Annuities.			512 11 0
Pay.	{ David Shore (a) } { Charles Weaver }	45 6 2	
Pay taxed costs of George Turner.			
Pay residue of funds as under :—			
One-fifth	George Turner.		
Out of one-fifth	James Watson.	100 0 0	
Residue of last-named one-fifth	Birmingham Banking Company, mortgagees.		
Out of one-fifth	Henry Earle (as mortgagee).	140 8 4	
Out of same one-fifth, interest on 100 <i>l.</i> at 5 <i>l.</i> per cent. per annum from 18 to day for payment.	The same.		
Residue of last-named one-fifth,	Robert Wild and Joseph Hunter, trustees of Arthur Turner.		
One-fifth	Matthew Field.		
One-fifth	William Long.		

(a) As to giving the address of the payees or transferees, see rule 6, *ante*, p. 319.

FORM No. 3.

[*Combined Lodgment and Payment Schedules referred to in Rule 8.*] (a)

LODGMET AND PAYMENT SCHEDULE.

In the High Court of Justice,
Chancery Division.

Date of order, 18 .

Title of cause or matter, 18 . A. No.

Ledger credit [if same as title of cause state "As above".]

I. LODGMET.

Particulars of funds to be lodged.	Person to make the lodgment.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.

II. PAYMENT.

Funds to be dealt with. {
 l. Consolidated Three per Cent. Annuities.
 l. cash.
 Funds to be lodged as above.

Particulars of payments, transfers, or other operations ordered.	Payees and transferees or separate accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.

By the Supreme Court (District Registry) Funds Rules, 1887 (which will be found in W. N. for 8th Oct., 1887, p. 405, and in Wilson, p. 771), the S. C. F. Rules of 1886 were, with slight modifications, made applicable to the district registries of Liverpool and Manchester.

By the S. C. F. Rules, March, 1888 (which will be found in Wilson, p. 773), "When payments not exceeding 50*l.* per annum are by an order directed to be made to a mother as guardian of her infant children, and such mother marries after the date of the said order, such payments may be made to her, notwithstanding her marriage, on her separate receipt."

3. RULES OF THE SUPREME COURT. (a)*Guardianship of Infants Act, 1886. (b)*

1. These rules may be cited as "The Rules of the Supreme Court, Guardianship of Infants," and shall apply to proceedings in the High Court of Justice, including appeals, under the Guardianship of Infants Act, 1886, hereinafter called the Act.

2. Any application under the Act may be made as follows :

(a.) Where there is pending any action or other proceeding by reason whereof the infant is a ward of court, then by a summons in such action or proceeding, and in the matter of the infant.

(b.) Where there is not pending any such action or other proceeding as aforesaid then by an originating summons in the matter of the infant.

3. A summons under sect. 2 of the Act may be taken out by any next friend of the infant, and shall be served upon the mother of the infant.

4 (a.) A summons under sect. 3, sub-sect. (2) of the Act may be taken out by any next friend of the infant, and shall be served upon the father of the infant.

(b.) A summons under sect. 3, sub-sect. (3), of the Act may be taken out by any guardian of the infant, and shall be served upon the other guardian or guardians.

5 (a.) A summons under sect. 5 of the Act taken out by the mother of any infant shall be served upon the father of the infant, or if he be dead, upon the guardian or guardians of the infant, if any such there be, other than the mother.

(b.) A summons under sect. 5 of the Act taken out by the father of any infant shall be served upon the mother of the infant, or if she be dead, upon the guardian or guardians of the infant, if any such there be, other than the father.

(c.) A summons under sect. 5 of the Act taken out by any guardian of an infant, other than a parent, shall be served upon the other guardian or guardians of the infant, if any such there be, other than a surviving parent, and also upon the surviving parent, if any.

6. A summons under section 6 of the Act may be taken out by any next friend of the infant, and shall be served upon his guardian or guardians.

7. All matters relating to removals and appeals from County Courts in respect of which jurisdiction is given to the High Court by the Act shall be transacted and disposed of in court or in chambers by or under the directions of any judge of the Chancery Division (hereinafter called the judge) named for that purpose by the Lord Chancellor.

8. The application of any party under sect. 10 of the Act for an order of removal from the County Court to the High Court shall be by an Originating Summons in the Chancery Division in the

(a) See W. N., 4th Feb., 1888, p. 71, Supp.

(b) See *ante*, p. 72.

matter of the infant, and shall be marked with the name of the judge. It shall not be necessary to serve the summons upon any person. When the judge upon hearing the summons shall (on such terms as to costs as he may think proper) have ordered the application to be removed to the High Court, the application shall be proceeded with before such judge; and the applicant shall serve a copy of the order upon the registrar of the County Court, who shall forthwith transmit all documents (if any) in the matter filed or lodged in the County Court to such officer as the judge may direct.

9. In any proceeding under the Act the judge may direct such persons, other than those in these rules respectively mentioned, to be served with the summons as he may think fit.

10. Upon any application under the Act for the appointment of a guardian of an infant the evidence shall show—

- (a) The age of the infant;
- (b.) The nature and amount of the infant's fortune and income;
- (c.) What relations the infant has.

11. Order LIX., rr. 10, 11, 12, 13, 16, and 17, shall apply to appeals to the Chancery Division of the High Court from County Courts under the Act. The appeal shall not operate as a stay of proceedings under the decision appealed from unless the County Court shall so order. (a)

12. The judge may after an appeal has been entered make such orders, either *ex parte* or otherwise, with regard to the custody of the infant pending the appeal and otherwise as he may think proper.

13. Subject to these rules, the rules for the time being in force with respect to appeals to the Queen's Bench Division from inferior courts, and also the rules for the time being in force with respect to appeals from the High Court to the Court of Appeal, shall, so far as is practicable, apply to appeals from County Courts to the High Court under the Act.

The 17th day of December, 1887.

(Signed) HALSBURY, C.
COLERIDGE, L.C.J.
ESHER, M.R.
C. E. POLLOCK, B.
H. MANISTY, J.

(a) Order LIX., r. 13, is impliedly repealed by the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 121. See *McGrah v. Cartwright* (60 L. T. Rep. N. S. 537; 23 Q. B. Div. 3)

APPENDIX II.

1. AFFIDAVIT FOR ENTRY OF APPEARANCE AS GUARDIAN. (a)

[Heading as in Form 1.] (b)

I, of make oath and say as follows :—

A.B., of is a fit and proper person to act as guardian *ad litem* of the above-named infant defendant, and has no interest in the matters in question in this action [matter] adverse to that of the said infant, and the consent of the said *A.B.* to act as such guardian is hereto annexed.

Sworn, &c.

[To this affidavit shall be annexed the document signed by such guardian in testimony of his consent to act.]

2. CONSENT TO ACT. (c)

I, *A. B.*, of hereby consent to act as a trustee of the [describe the instrument.]

(Signed) *A. B.*

I, *C. D.* of , solicitor, hereby certify that the above written signature is the signature of *A.B.* the person mentioned in the above written consent.

(Signed) *C. D.*

3. ADVERTISEMENT OF ORIGINATING SUMMONS. (d)

In the High Court of Justice.

1888, C. No. 2817.

Chancery Division.

Mr. Justice Chitty.

C. and another v. G. and another.

To the defendant *W. C.* Take notice that this action was on the 23rd day of July, 1888, commenced against *E. G.* and yourself by Originating Summons, and that the plaintiffs by such summons claim that an account may be taken of what is due to you and the

(a) See *ante*, p. 20.

(b) The heading of Form 1 is as follows :—

“In the High Court of Justice,
Division.

18 No.

Between

and

, Plaintiff,

, Defendant.”

(c) See *ante*, p. 45.

(d) See *ante*, p. 50.

said *E. G.*, for principal and interest upon an indenture of mortgage dated the 16th of May, 1872, and made between *C. A. B.* of the one part and you the said *W. C.* and *J. G.* of the other part, and upon an indenture of further charge endorsed thereon and for costs of action and for redemption of the premises comprised in the said indenture of mortgage, and that the court has, by order dated the 2nd day of August, 1888, authorised service of the said summons on you by the insertion of this notice once in the *Times* and *Standard* newspapers.

And further, take notice that you are required to appear to the said summons within eight days after the insertion of the last of the said notices in manner aforesaid inclusive of the day of such insertion, and that in default of your so doing the plaintiffs may proceed therein and judgment may be given in your absence. The hearing of the said summons is adjourned to the 2nd November, 1888, at 11.30.

Dated this 10th day of August, 1888.

W. and Sons, street, E.C., Plaintiffs' Solicitors.

4. ORIGINATING SUMMONS. (a)

In the High Court of Justice.

Chancery Division.

Mr. Justice

In the matter of the estate of *A. B.*, deceased.

Between *C. D.*, Plaintiff,

and

E. F., Defendant.

Let *E. F.*, the executor of the said *A. B.*, attend at the chambers of Mr. Justice at the Royal Courts of Justice at the time specified in the margin [*or, at the foot*] hereof, upon the application of *C. D.*, of , Esq., who claims to be a creditor [*or, as the case may be*] upon the estate of the above-named *A. B.*, for an order for the administration of the personal [*or real and personal*] estate of the said *A. B.*

Dated the day of 18 .

(Seal.

This summons was taken out by , of solicitors for the above-named *C. D.*

The following note to be added to the original summons, and when the time is altered by indorsement the indorsement to be referred to as below :—

NOTE.—If you do not attend either in person or by your solicitor at the time and place above mentioned [*or at the place above mentioned at the time mentioned in the indorsement hereon*], such order will be made and proceedings taken as the judge may think just and expedient.

5. BY DIRECTION OF THE JUDGES ATTACHED TO THE CHANCERY DIVISION, THE FOLLOWING CERTIFICATE IS TO BE LODGED IN CHAMBERS BEFORE AN ORIGINATING SUMMONS IS SEALED THERE UNDER ORDER LV., R. 21. (a)

In the High Court of Justice.

Chancery Division.

188 , , No.

Vice-Chancellor Bacon,
or Mr. Justice

In the matter of

Between , Plaintiff,
and

Defendant.

I, solicitor for the plaintiff [or applicant], hereby certify that no proceedings have been commenced or taken in this or any other court, and no previous application has been made to this or any other court or any judge thereof, to effect the same or a similar object to that for which the sanction or decision of the court or judge is sought by the summons issued herein, on the day of 188 .

And that such summons does not relate to, nor is the same [If summons so connected with, any action, cause, or matter assigned to any judge of this court as to be conveniently dealt with by the same judge. marked for any judge on certificate (under Order V., r. 9, sub-sect. e), this portion of certificate to be omitted.]

Dated the day of 188 .
Plaintiff's [or applicant's] solicitor.

6. TITLES TO ORIGINATING SUMMONSES, &C. (b)

The following regulations are to be observed as far as practicable; Administration summonses and summonses under Order LV., r. 3, are to be entitled.

In the matter of the estate of *A. B.*, deceased.

Between *C. D.* Plaintiff,

and

E. F., Defendant.

or

In the matter of the Trusts of the Settlement made on the marriage of *A. B.* with *C. D.* dated, &c.

F. G. plaintiff.

G. H. defendant.

or Where the instrument creating the trust is other than an indenture of settlement,

(a) See *ante*, p. 102.

(b) See *ante*, p. 102.

In the matter of the *Trusts of an indenture*, dated
and made between *A. B.* of the one part, and *C. D.* of the
other part.

F. G., plaintiff,
H. I., defendant.

Summonses under Order LV. r. 5a for redemption or foreclosure of mortgage are to be entitled as heretofore as in an action not in a "matter" thus:

Between *A. B.* Plaintiff,
C. D. Defendant.

PETITIONS AND ORIGINATING SUMMONSES UNDER ACTS OF PARLIAMENT
GIVING SUMMARY JURISDICTION.

In all cases where a petition is presented or an Originating Summons is issued under the authority of an Act of Parliament giving summary jurisdiction or rules of court, the petition or summons must be entitled in a substantial matter (*as the first title*), and also in the matter of the particular Act as well as any general Act applicable; such as the Lands Clauses Consolidation Acts, 1845, 1860, and 1869, or the Mortgage Debenture Acts, 1865 and 1870, or the Copyhold Acts, or the Defence Act, 1860, or the Improvement of Land Act, 1864, or the Tramways Act, 1870, or the Consolidated Permanent Charges Redemption Act, 1873, or the Trustee Act, or the Settled Land Act, &c., or otherwise, as the case may be, for instance:

1. If it be a railway or other local Act, and under its powers a portion of any estate under settlement, or of the estate of any testator or intestate has been taken, the petition or summons must be entitled in the matter of such settlement or of the estate of such testator or intestate, and in the matter of the credit to which the money has under the special Act been paid, and in the matter of the general Act or Acts.

Example 1,
Lands Clauses
Acts.

1886, W., No.

In the matter of the estate of George Woolley, deceased;
Ex parte the South Devon Railway.

In the matter of the South Devon Railway Act, 1844, the
vendors, John Smith and Robert Stiles, trustees of the
estate of George Woolley, deceased, vendors without
power of sale; and

In the matter of the Lands Clauses Consolidation Acts, 1845,
1860, and 1869 (*as the case may be*).

Example 2,
Lands Clauses
Acts.

1886, T., No.

In the matter of the estate of William Thomas an infant;
Ex parte the Metropolitan Board of Works.

In the matter of the Metropolitan Street Improvement Act,
1883.

The vendor, William Thomas, an infant.

In the matter of the Lands Clauses Consolidation Acts,
1845, 1860, and 1869.

Example 3,
Lands Clauses
Acts.

1886, I., No.

In the matter of the trusts of the settlement made on the
marriage of John Jarvis and Sarah, his wife;

Ex parte the Metropolitan Board of Works.

In the matter of the Metropolitan Street Improvement Act, 1883.

The vendors, John Smith and Robert Jones, trustees of settlement of John Jarvis and Sarah, his wife, without power of sale.

In the matter of the Lands Clauses Consolidation Acts, 1845, 1860, and 1869.

2. If land belonging to a rector, vicar, or other corporate body, then it must be entitled *Ex parte* the rector, vicar, or corporate body, as the case may be, and in the matter of the Act or Acts.

1886, W., No.

Example 4,
Lands Clauses
Acts.

Ex parte the Rector of Woolwich in the county of Kent.

Ex parte the South Eastern Railway Company.

In the matter of the South Eastern Railway Act (additional powers) 1882. The vendor, Rector of Woolwich, without power of sale.

In the matter of the Lands Clauses Consolidation Acts, 1845, 1860, and 1869.

3. If under the Parliamentary Deposits Act it must be in the same title as that to which the fund stands in the Chancery Pay Office and of the Act.

1886, A., No.

Example 5,
Parliamentary
Deposits
Act.

In the matter of the undertaking of the A. B. Railway Bill (*as the case may be*), and

In the matter of the Act of Parliament, 9 Vict. c. 20, entitled an Act to amend an Act of the second year of Her present Majesty, for the custody of certain moneys paid in pursuance of the standing orders of Parliament, by subscribers to works or undertakings to be effected under the authority of Parliament.

4. If to deal with money in court under the *Legacy Duty Act* it must be in the same title as that under which the fund stands in the books of the Chancery Pay Office and in the matter of the Act 36 Geo. 3, c. 52.

1886, G., No.

Example 6,
Legacy Duty
Act.

In the matter of John Greaves, an infant legatee [*or J. G., absent beyond the seas*], and in the matter of the Act 36 Geo. 3, c. 52, entitled "An Act, &c."

5. If under the Trustee Act in the matter of the trusts of the will or other instrument and of the Act.

1886, S., No.

Example 7,
Trustee Act.

In the matter of the trusts of the will of John Smith, of , dated 4th July, 1832.

In the matter of the Trustee Act, 1850 [*add where applicable*], and of the Act 15 & 16 Vict. c. 55, entitled "An Act to extend the provisions of the Trustee Act, 1850."

6. If under *Private Acts* should be entitled in the matter of the title to the Act.

Example 8,
Private Act.

1886, B., No.

In the matter of an Act [*state session*] Victoria, cap. [*state chapter*] for empowering the trustees of the estate of *A. B.* deceased, to grant leases, and for other purposes.

7. If under the Settled Land Act, 1882, it must be entitled in accordance with the rules of the Supreme Court (December, 1882) under that Act, and in the form given in the appendix to such rules, as varied by the form Appendix L., No. 25, R. S. C., 1883.

Example 9,
Settled Land
Acts 1882 and
1884.

1886, J., No.

or

1886, R., No.

In the matter of the Blackacre estate [*or of the timber on the estate*], situate at _____, in the county of _____, [*or of the chattels*], settled by the settlement dated the _____ day of _____, made on the marriage of John Jones and Mary his wife [*or by the will of George Roberts, dated _____*].

And in the matter of the Settled Land Act, 1882.

Example 10,
Infant.

1886, S., No.

In the matter of the Blackacre estate [*or of the timber on the estate*], situate at _____, in the county of _____, settled land within the meaning of the Settled Land Act, 1882, s. 59, by reason of John Smith, the person seised of or entitled to such land, being an infant.

In the matter of the Settled Land Act, 1882.

Example 11,
Tenant by
curtesy.

1886, R., No.

In the matter of the Blackacre estate at _____, in the county of _____, settled by a settlement within the meaning of the Settled Land Act, 1884, s. 8, by Mary Roberts, deceased, the late wife of John Roberts.

In the matter of the Settled Land Act, 1884.

Example 12,
Vendor and
Purchaser
Act, 1874.

8. If under the Vendor and Purchaser Act.

1886, B., No.

In the matter of the contract dated the _____ day of _____, 188____, for sale of (Blackacre) estate, situate at _____, in the county of _____, and made between *A. B.* (vendor), and *C. D.* (purchaser).

And in the matter of the Vendor and Purchaser Act, 1874.

9. If under the Conveyancing and Law of Property Act, 1881.

Example 13,
Conveyancing
and Law of
Property Act,
1881, sect. 39.

1886, B., No.

In the matter of the trusts of the settlement, dated the _____, made on the marriage of *A. B.* (husband) with *C. D.* (the wife).

In the matter of the Conveyancing and Law of Property Act, 1881.

10. If under the Married Women's Property Act.

	1886, B., No.	Example 14,
In the matter of the policy of assurance in the Law Life Assurance Society on the life of <i>A. B.</i> , No. 2175.		Married Women's Pro-
And in the matter of the Married Women's Property Act, 1882.		erty Act, 1882, sect. 11.
	1886, B., No.	Example 15,
In the matter of the question between John Brown and Mary Brown, his wife, as to certain property [<i>describe property shortly</i>].		Married Women's Pro-
And in the matter of the Married Women's Property Act, 1882.		erty Act, 1882, sect. 17.

The address and description of the applicant and of the next friend (if any), and of the respondents, should in all cases be stated in the petition or summons, and if the applicants apply as, or the respondents are summoned as trustees, or in a representative capacity, the fact should appear, and the rule (if any) under which the application is made should be stated.

If the applicants or respondents are females it should be shown on the petition or summons whether they are spinsters, married women, or widows.

APPENDIX III.

The following (forms 1-11) is a complete set of forms in an action commenced by Originating Summons under Order LV. rr. 3 and 4, R. S. C. 1883, from the issuing of the originating summons to the final judgment of the House of Lords.

1. ORIGINATING SUMMONS. (a)

1886, C., No.

In the High Court of Justice.

Chancery Division.

Mr. Justice

In the matter of the Estate of *T. J. C.*, deceased.Between *A. A. C.*, Widow, Plaintiff,

and

C. M. L., the Wife of *E. B. L.*, (b) Defendant.Originating
Summons.On the day
of December,
1886, at 11.30
o'clock in the
forenoon.

L.S.

Let the above-named *C. M. L.* of , in the County of , the wife of *E. B. L.* (as the sole heiress at law and next of kin of the above-named *T. J. C.*, deceased) attend at the chambers of Mr. Justice , at the Royal Courts of Justice, at the time specified in the margin hereof upon the application of *A. A. C.*, the sole executrix of the will, bearing date the 14th day of March, 1884, of the above-named *T. J. C.*, deceased, and a devisee and legatee under the said will under Order LV., rr. 3 and 4 of the Rules of the Supreme Court, 1883, that the following question arising in the administration of the estate of the said *T. J. C.* may be determined, viz. :

What are the rights and interests of the plaintiff *A. A. C.* under the said will in the real and personal estate of the said *T. J. C.*, and whether any, and if any, what interest in such real and personal estate respectively, or in any and what part or parts thereof is undisposed of by the said will.

And if and so far as necessary for the determination of the above question that the real and personal estate of the said testator may be administered. L. S.

Dated the day of November, 1886.

This summons was taken out by of , London, E.C., Solicitor for the above-named *A. A. C.*, the plaintiff.

To the above-named *C. M. L.* (c)

NOTE.—If you do not attend either in person or by your solicitor at the time and place above-mentioned, such order will be

(a) This summons is not quite in the ordinary form. For other forms see *post*, pp. 356, 365, &c.

(b) As the testator died in 1886 the husband of defendant was not a necessary party.

(c) Here should follow her address and description, unless already mentioned in the summons.

made and proceedings taken as the judge may think just and expedient.

Before you will be heard in Chambers you will have to enter an appearance in the Central Office, and give notice of such appearance.

2. PLAINTIFF'S AFFIDAVIT IN SUPPORT OF SUMMONS. (a)

1886, C., No.

In the High Court of Justice
Chancery Division.

Filed, December, 1886.

In the matter of the estate of *T. J. C.*, deceased.

Between *A. A. C.*, Widow, Plaintiff,

and

C. M. L., the Wife of *E. B. L.*, Defendant.

I, A. A. C., of _____, in the county of _____, widow, the above-named plaintiff, make oath, and say

1. I am the lawful widow and relict of *T. J. C.*, late of aforesaid, solicitor, deceased, who died on the _____ of _____, 1886, having by his will bearing date the 14th day of March, 1884, appointed me sole executrix thereof, and which will was duly proved by me as such executrix in the Probate Division of this Honourable Court on the _____ of November, 1886, and such probate is now produced and shown to me marked with the letter *P*.

2. The whole of the real and personal estate of the said deceased, of or to which he died possessed or entitled, and which by his will, is given to me as therein mentioned, consists of certain money at his bankers, the _____ Bank Limited, money due to him on mortgage and interest, some leasehold houses in _____, in Surrey, his furniture, and some shares in companies, all of which I estimate at the value of 25,000*l.* and upwards. The only further property which the testator died possessed of consists of twenty-five freehold houses at _____, in the county of _____, his residence "*X*" aforesaid, and some freehold ground rents, at _____, in the county of Kent, all of which I estimate of the value of 7500*l.* and upwards.

3. The deceased was eighty-five years of age at his death, and I was married to him by special licence at "*X*," on the 8th day of February, 1884, and directly after our marriage the testator drew a draft of his will, which draft was afterwards copied by Mr. _____, a solicitor, and one of the attesting witnesses thereto, and after consultation with the testator was engrossed by him, and with the exception of the addition by the latter of the gift of the residue and of *X*. aforesaid, both of which testator had omitted in his own draft, and to which Mr. _____ drew his attention, and by his instructions inserted, the will as set forth in the said probate is the same in all respects as that drawn by the testator himself.

4. The testator died without leaving any issue, and the above-

(a) The facts in this case were not in dispute, and *strict* evidence was not filed. There was no "Statement of Facts."

named defendant *C. M. L.*, who is the only child of a sister of the deceased, was, I believe, at his death, and still is, his sole heiress at law and next of kin.

Sworn, at, &c.

A. A. C.

Filed on behalf of the plaintiff,
T. L.

3. ORDER OF MR. JUSTICE ———.

1886, C., 4872.

[*Omitting formal parts.*]

This court doth declare that according to the true construction of the will of the said testator *T. J. C.*, the plaintiff *A. A. C.* is absolutely entitled to the whole of the real and personal estate of the testator subject to his debts and legacies bequeathed by his will.

And it is ordered that it be referred to the taxing master to tax the costs of the defendant of this application as between solicitor and client including the costs of the adjournment thereof into court.

And by consent it is ordered that the plaintiff *A. A. C.* do pay to the defendant *C. M. L.* her costs when taxed out of the testator's estate.

4. NOTICE OF APPEAL.

In the Court of Appeal. (*a*) 188 , C., No.

In the matter of the Estate of *T. J. C.*, deceased.

Between *A. A. C.*, Widow, Plaintiff,
and

C. M. L., the Wife of *E. B. L.*, Defendant.

Take notice that this court will be moved on (*b*) day, the day of April, 1887, or so soon thereafter as counsel can be heard, by counsel on the part of the above-named defendant *C. M. L.* that the judgment made in this matter and action, and dated the day of February, 1887, may be reversed so far as it declares that, according to the true construction of the will of the said testator *T. J. C.*, the plaintiff *A. A. C.* is absolutely entitled to the whole of the real and personal estate of the testator subject to his debts and legacies bequeathed by his will; and that it may be adjudged that, according to the true construction of the said will, the plaintiff *A. A. C.* is entitled to a life estate or interest only in the real and personal estate of the said testator subject to his debts and the legacies bequeathed by his said will, and that subject to such life estate, or interest, and debts, and legacies, the said testator died intestate as to his real and personal estate.

Dated this day of 188 .
 T. and L. street, in the county of
 (address for service street aforesaid).

Solicitors for the Defendant, *C. M. L.*

To the Plaintiff *A. A. C.* and Mr. *T. L.*, her Solicitor.

(*a*) As to appeals to the Court of Appeal and the practice thereon, see *ante*, p. 146.

(*b*) This should be the first day after the expiration of fourteen days from service of this notice on which the Court of Appeal sits to hear appeals from final orders.

5. ORDER OF THE COURT OF APPEAL.

[*Omitting formal parts.*]

This court doth order that the said order be varied by omitting the declaration in the said order contained, and by declaring in lieu thereof that, according to the true construction of the will of the testator, *T. J. C.*, the plaintiff, *A. A. C.*, is absolutely entitled to the properties at _____, and the houses in G.-road, P., mentioned in the said will, and to the household furniture, goods, and effects in and about the house called X., and to a life interest in the house X., L. A.-road, C., in the county of Surrey, and in the residuary, real, and personal estate of the said testator, and that, subject to such life interest, the said house called X., and the residuary, real, and personal estate are undisposed of.

And it is hereby referred to the taxing master to tax, as between solicitor and client, the costs of the plaintiff and defendant of the application for the said order, dated the _____ day of February, 1887, and of such order.

And it is ordered that such costs, when taxed, be raised and paid out of the residuary estate of the said testator.

And this court doth not think fit to allow any costs of this appeal.

IN THE HOUSE OF LORDS. (a)

6. PETITION OF APPEAL.

To the Right Honourable the House of Lords.

The humble petition and appeal of *A. A. C.*, of _____, in the County of _____, widow.

Your petitioner humbly prays that the matter of the order of the Court of Appeal, set forth in the schedule hereto, may be reviewed before Her Majesty the Queen, in her Court of Parliament, and that the said order may be reversed and the order of the High Court of Justice, dated the _____ February, 1887, therein mentioned, be affirmed, or that the petitioner may have such other relief in the premises as to Her Majesty the Queen, in her Court of Parliament, may seem meet, and that *C. M. L.*, the wife of *E. B. L.*, mentioned in the schedule to the appeal, may be ordered to lodge such printed case as she may be advised, and the circumstances of the case may require, in answer to this appeal, and that service of such order on the solicitors in the cause of the said respondent may be deemed good service.

[Signed by two counsel.]

Schedule.

“From Her Majesty’s Court of Appeal (England).” “In a certain cause and matter entitled In the matter of the estate of

(a) As to the practice on appeals to the House of Lords, see *The Appellate Jurisdiction Act, 1876*, 39 & 40 Vict. c. 59, and the *Standing Orders*, which can be obtained of *Eyre and Spottiswoode* for a small sum, and will be found in *Wilson*, p. 803, *et seq.*; and see *Dan. F.*, p. 630.

T. J. C., deceased, wherein *A. A. C.* was plaintiff, and *C. M. L.*, the wife of *E. B. L.*, was defendant.

The order of the Court of Appeal, dated the day of June, 1887, appealed from is in the words following [*here follows the whole of the order appealed from in italics.*]

We humbly conceive this to be a proper case to be heard before your Lordships by way of appeal.

[Signed by two counsel.]

7. NOTICE OF APPEAL TO THE HOUSE OF LORDS.

12th August, 1887.

[Supreme Court of Judicature—In Her Majesty's Court of Appeal].^(a)

In the matter of the estate of *T. J. C.*, deceased.

Between *A. A. C.* (widow), Plaintiff,
and

C. M. L. (the wife of *E. B. L.*), Defendant.

Take notice that on the 16th day of August instant, or as soon afterwards as may be, a petition of appeal, of which the annexed is a copy, will be presented to the House of Lords against the order made in this cause on the 23rd day of June last.

T. L.,

Square, E.C.

Solicitor for the above-named plaintiff.

To Messrs. *T. and L.*

Street,

Solicitors for the above-named defendant.

8. CASE OF THE APPELLANT.

In the House of Lords.

On Appeal from Her Majesty's Court of Appeal (England).

Between *A. A. C.* (widow), Appellant,
and

C. M. L. (the wife of *E. B. L.*), Respondent.

Case of the Appellant.

1. The question in this appeal is one of construction arising upon the will of *T. J. C.*, late of X., in the county of , solicitor, deceased, who died on the 18th day of September, 1886.

2. The said *T. J. C.*, duly made his will, dated the 14th day of March, 1884, which was in the following terms:—"This is the last will and testament of me, *T. J. C.*, formerly and for many years of No. 4, Street, in the city of London, afterwards and also

(a) Although the words in square brackets were actually used in this case, it is submitted that this notice should have been headed "In the House of Lords. On an appeal from Her Majesty's Court of Appeal," as at Dan. F., 1475.

for some years at No.

Street, and subsequently at No.

Street, in the same city of London, and most of the time at my own freehold private residence, called 'X.,' in the county of Surrey, gentleman, made this 14th day of March, 1884, as follows: I give the following pecuniary legacies, namely, the sum of 100*l.* to my dear wife, *A. A. C.*, for her present wants, and for housekeeping expenses, and I appoint her sole executrix of this my will. I give to *J. M.*, wife of *P. M.*, of _____, in the county of Berks, mealman and baker, the sum of 50*l.* for her sole and separate use, independently of any husband with whom she may intermarry. I hereby declare that her receipt alone, whether covert or sole, shall be a good discharge to my said executrix for such legacy or sum of 50*l.* I give to *L. C.*, widow of the late *Mr. G. C.*, of No. _____ Road, London, the sum of 50*l.*, to be paid to her on her sole receipt. I give to *K. M.*, daughter of the said *P.* and *J. M.*, the sum of 50*l.*, to be paid to her on her sole receipt. I give to *L. M.*, son of the said *P.* and *J. M.*, of _____ Grove, in the county of Middlesex, the sum of 50*l.*, to be paid on his sole receipt. To *E. T. A.*, wife of *W. P. A.*, of _____, in the county of Middlesex, gentleman, the sum of 50*l.*, to be paid to her on her sole receipt. If any of the last-named persons should at the time of my decease be under any disability, then I direct that any one or more of the said legacies shall be invested in Three per Cent. Consolidated Bank Annuities, and paid to them, or any of them, on the ceasing of such disability. I give, devise, and bequeath all the rents and income of all my freehold, copyhold, and leasehold properties at _____, in the county of _____, unto my wife, *A. A. C.* (which rents are now collected by *Mr. N.*, builder, of _____ Road, _____, aforesaid). I also give and bequeath to my said wife, *A. A. C.*, all the rents and profits of my leasehold houses in the G.-road, P. (and which rents are now collected for me by *Mr. G. B. S.*, of or near the same place). I also direct that she shall be entitled to all other the income of my estate and effects, real and personal, and that any money which may be in my house or in the hands of my said wife, may be invested in her name in the said Three per Cent. Consolidated Bank Annuities, and the interest to arise therefrom may be retained or received by my said wife, as part of my income. I also declare my will to be that, if any of the legatees hereinbefore-named shall wish to purchase any trifling thing and keep the same as a memento on my account, I desire that they shall be at liberty to do so. I desire to be buried in my grave, devised to me in perpetuity by the directors and owners of the board of _____ cemetery, and that my said wife shall be at liberty, out of the proceeds of my surplus residuary estate, to erect any monument to my memory which she may please, not exceeding the sum of 300*l.* I also give and bequeath to my said wife, *A. A. C.*, all my household furniture, goods, and effects, in and about my said dwelling-house at X. aforesaid, for her sole and separate use. And I also desire that my said wife shall have the free use and occupation of my said house, called X., aforesaid. I direct that an inventory of such furniture and effects may be made and kept therewith. In witness, &c."

3. The testator died without having revoked or altered his said

will, and the same was duly proved by his widow, the appellant, on the 27th November, 1886, in the Probate Division of the High Court of Justice.

4. The testator left no issue. The respondent, *C. M. L.*, who is the only child of a sister of the testator, was at the testator's death his heiress-at-law and sole next of kin.

5. The testator was at his decease entitled to the leasehold houses at _____, mentioned in his will, and to other personal estate of the value in all of about 25,000*l.* His real estate consisted of some freehold houses at _____, of his residence *X.*, and of some freehold ground rents, at _____ of small value.

6. An Originating Summons in the Chancery Division of the High Court of Justice was taken out by the appellant, *A. A. C.*, praying that her rights and interests, under the said will, in the real and personal estate of the testator might be determined, and so far as necessary for administration of the real and personal estate of the said testator, and by the order made upon the hearing of the said summons before his Lordship, Mr. Justice _____, dated

February, 1887, the court did declare that, according to the true construction of the will of the said testator, *T. J. C.*, the plaintiff, *A. A. C.*, was absolutely entitled to the whole of the real and personal estate of the testator, subject to his debts and the legacies bequeathed by his will, and it was ordered that it be referred to the taxing master to tax the costs of the defendant of that application, as between solicitor and client, including the costs of the adjournment thereof into court, and by consent it was ordered that the plaintiff, *A. A. C.*, should pay to the defendant, *C. M. L.*, her costs, when taxed out of the testator's estate.

7. The said *C. M. L.* appealed from the said order of Mr. Justice _____ to the Court of Appeal, and by the order of the Court of Appeal, dated the _____ day of June, 1887, the court did order that the said order, dated _____ February, 1887, be varied by omitting the declaration in the said order contained, and by declaring in lieu thereof that according to the true construction of the will of the testator *T. J. C.*, the plaintiff *A. A. C.* was absolutely entitled to the properties at _____, and the houses in *G.-road*, *P.*, mentioned in the said will, and to the household furniture, goods, and effects in and about the house called *X.*, and to a life interest in the house *X.*, in the county of Surrey, and in the residuary real and personal estate of the said testator, and that subject to such life interest the said house called *X.*, and the residuary real and personal estate were undisposed of. And it was referred to the taxing master to tax as between solicitor and client the costs of the plaintiff and defendant of the application for the said order dated the _____ day of February, 1887, and of that order, and it was ordered that such costs when taxed be raised and paid out of the residuary estate of the said testator, and the court did not think fit to allow any costs of the appeal.

The appellant is advised and humbly submits that the order of the Court of Appeal, dated _____ June, 1887, varying the order of the High Court of Justice, dated _____ February, 1887, is erroneous and ought to be reversed, and that the order of the High Court of Justice, dated _____ February, 1887, ought to be

affirmed and restored, and the appellant has appealed from the said order of the Court of Appeal to this most Honourable House for the following (among other)

Reasons.

1. Because the testator has by his will expressly given to his widow, the appellant, all the income of his residuary real and personal estate without limit as to time, and such gift in law passes to her the absolute interest in the said property.

2. Because the construction put upon the will by the order of the Court of Appeal giving to the appellant a life tenancy only in the residuary estate followed by an intestacy after the appellant's death does not accord either with the language of the will, or with the intentions of the testator.

3. Because the construction declared by the order of the High Court of Justice is necessary in order to give full effect to the terms of the will, and is in conformity with the settled rule of construction and with the testator's declared intention.

[Signed by one counsel.]

9. CASE OF THE RESPONDENT.

In the House of Lords.

On Appeal

From Her Majesty's Court of Appeal (England).

Between *A. A. C.*, Appellant,

and

C. M. L., the wife of *E. B. L.*, Respondent.

Case of the Respondent.

1. This is an appeal from an order of the Court of Appeal, dated the day of June, 1887, varying an order of the High Court of Justice, dated day of February, 1887, by omitting the declaration in such order contained, that, according to the true construction of the will of the testator *T. J. C.*, the plaintiff *A. A. C.* (now the appellant, and hereinafter referred to as the plaintiff) was absolutely entitled to the whole of the real and personal estate of the testator subject to his debts and legacies bequeathed by his will, and by declaring in lieu thereof that according to the true construction of the said will the plaintiff was absolutely entitled to the properties at , and the houses in *G.-road, P.*, mentioned in the said will, and to the household furniture, goods, and effects in and about the house called *X.*, and to a life interest in such house called *X.*, and in the residuary real and personal estate of the said testator, and that subject to such life interest the said house called *X.*, and the residuary real and personal estate, were undisposed of.

2. The action was commenced by Originating Summons, dated the day of November, 1886, under Order *LV.*, rr. 3 and 4, of the Rules of the Supreme Court, 1883, for the purpose of determining what were the rights and interests of the plaintiff under the will, dated the day of March, 1884, of the said *T. J. C.*, in his real and personal estate, and whether any, and (if any) what interest in such real and personal estate respectively, or in any and what part or parts thereof, was undisposed of by the said will. And

Formal Order of 23rd June, 1887. Appendix, p. 11.
Notes of judgment, Appendix, p. 12.
Formal order of 19th February, 1887, Appendix, p. 7.
Notes of judgment, Appendix, p. 8.

Appendix, p. 5.

if and so far as necessary for the determination of the above question for administration of the real and personal estate of the said testator.

Formal order of 19th February, 1887, Appendix, p. 7. Notes of judgment, Appendix, p. 8.

3. The action was heard before Mr. Justice _____, on the _____ day of February, 1887, when his Lordship reserved judgment, and upon the _____ day of February, 1887, his Lordship pronounced the judgment or order set out in the Appendix, page 7.

4. The defendant *C. M. L.* (now the respondent, and hereinafter referred to as "the defendant") appealed against the said judgment of the _____ February, 1887, and such appeal came on to be heard before the Court of Appeal, consisting of Lord Justices Cotton, Bowen, and Fry, on the _____ day of June, 1887, when their Lordships varied the said judgment or order of the _____ day of February, 1887, in manner hereinbefore mentioned. The judgment of the Court of Appeal will be found at page 12 of the Appendix.

Formal order of 23rd June, 1887, Appendix, p. 11. Notes of judgment, Appendix, p. 12.

5. The plaintiff then appealed to your Lordships' House.

6. The testator *T. J. C.* was a solicitor, and on the _____ day of February, 1884, he being then upwards of eighty-two years of age, intermarried with the plaintiff.

7. The said testator made his will, dated the _____ day of March, 1884, and thereby gave a legacy of 100*l.* to his said wife the plaintiff for her present wants and housekeeping expenses, and appointed her sole executrix, and after giving several other pecuniary legacies, the will proceeded as follows: "I give, devise, and bequeath all the rents and income of all my freehold, copyhold, and leasehold properties at _____ in the county of _____, unto my wife *A. A. C.* (which rents are now collected by Mr. *N.*, builder, of _____, aforesaid). I also give and bequeath to my said wife *A. A. C.* all the rents and profits of my leasehold houses, in the G.-road, P. (and which rents are now collected for me by Mr. *G. B. S.*, of or near the same place). I also direct that she shall be entitled to all other the income of my estate and effects, real or personal, and that any moneys which may be in my house, or in the hands of my said wife, may be invested in her name in the said 3 per cent. Consolidated Bank Annuities, and the interest to arise therefrom may be retained or received by my said wife as part of my income. I also declare my will to be that if any of the legatees hereinbefore named shall wish to purchase any trifling thing and keep the same as a memento on my account, I desire that they shall be at liberty to do so. I desire to be buried in my grave, devised to me in perpetuity by the directors and owners of the board of _____ Cemetery, and that my said wife shall be at liberty out of the proceeds of my surplus residuary estate to erect any monument to my memory which she may please, not exceeding the sum of 300*l.* I also give and bequeath to my said wife *A. A. C.* all my household furniture, goods and effects in and about my said dwelling-house at X. aforesaid for her sole and separate use. And I also desire that my said wife shall have the free use and occupation of my said house called X. aforesaid. I direct that an inventory of such furniture and effects may be made and kept therewith."

8. The testator died on the 18th day of September, 1886,

leaving him surviving his widow, the plaintiff, but no children or other issue.

9. The said will was duly proved by the plaintiff on the day of November, 1886.

10. The defendant was made a defendant to the said Originating Summons as being—and she was at the death of the said testator, and still is—the sole heiress-at-law and next-of-kin, according to the statutes of distributions, of the said testator.

11. The plaintiff in her affidavit in support of the Originating Affidavit of Summons stated that the whole of the real and personal estate of plaintiff, the said testator, of or to which he died possessed or entitled (and Appendix, which the plaintiff incorrectly alleged was given to her as in such p. 6. will mentioned) consisted of certain money at his bankers, the

Bank Limited, money due to him on mortgage and interest, some leasehold houses in P., in Surrey, his furniture, and some shares in companies, all of which she estimated of the value of 25,000*l.* and upwards, and that the only further property which the said testator died possessed of consisted of twenty-five freehold houses at , in the county of Herts, his residence X. aforesaid, and some freehold ground rents at , in the county of Kent, all of which she estimated of the value of 7500*l.* and upwards.

12. The defendant is advised, and humbly submits that the said judgment or order of the day of June, 1887, is right, and that the same ought to be affirmed for, amongst others, the following

Reasons.

1. That the question is one of construction, and it appears by the will of the said testator that he intended that the plaintiff should have a life interest only in the said house X., and in the residuary real and personal estate of the said testator.

2. That the state of facts under which the said will was made supports the construction that the plaintiff took only a life interest, and not an absolute interest in the said house and residuary real and personal estate.

3. Because the said judgment or order of the Court of Appeal is right, and ought to be affirmed.

[Signed by one counsel.]

10. APPENDIX TO CASE. (a)

In the House of Lords.

On appeal from Her Majesty's Court of Appeal (England).

Between A. A. C. (widow), Appellant

and

C. M. L. (the wife of E. B. L.), Respondent.

APPENDIX.

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2.	Affidavit of appellant in support of summons...	...

(a) As to the Appendix see Standing Orders of House of Lords, and Dan. F., p. 640, note.

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4. Shorthand writer's notes of judgment of Mr. Justice —	...
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6. Shorthand writer's notes of the judgment of the Court of Appeal	...
Lord Justice Cotton	...
Lord Justice Bowen	...
Lord Justice Fry	...

[Here will be printed in order the documents referred to in the above index.]

11. JUDGMENT OF THE HOUSE OF LORDS.

[Omitting formal parts.]

It is ordered and adjudged by the Lords Spiritual and Temporal in the Court of Parliament of Her Majesty the Queen assembled, that the said order of Her Majesty's Court of Appeal of the 23rd of June, 1887, complained of in the said appeal be and the same is hereby affirmed, and that the said petition and appeal be and the same is hereby dismissed this House. And it is further ordered that the costs both in this House and in the courts below be paid out of the estate of the testator *T. J. C.*, the amount of the costs incurred in respect of the said appeal to this House to be certified by the Clerk of the Parliaments.

12. ORIGINATING SUMMONS FOR APPOINTMENT OF GUARDIAN OF PERSON AND ESTATE AND ALLOWANCE FOR MAINTENANCE OUT OF CORPUS. (a)

In the High Court of Justice 1888, M., No.
Chancery Division,
Mr. Justice

In the matter of *M. J. W.* and *N. W.*, infants, by
A. W., their half-sister and next friend.

Let [all parties concerned (b)] attend at the chambers of Mr. Justice , at the Royal Courts of Justice, Strand, London, at the time specified in the margin hereof, upon the application on the part of the above-named infants *M. J. W.* and *N. W.* respectively, by the above-named *A. W.*, of , in the county of spinster, their next friend.

1. That the said *A. W.*, or some other proper person, may, upon giving security, be appointed guardian of the person and estate of the said infants during their respective minorities, or until further order.

2. That the annual sum of l.(c) may be allowed for the

(a) As to guardianship, maintenance, and advancement of infants, see ante, p. 71, et seq.

(b) Instead of the words in brackets it would be better to insert "*E. C.*, of , in the county of , widow."

(c) By S. C. F. R., 1886, r. 68, income tax is required to be deducted from maintenance out of a fund in court. If, therefore, the allowance is to be free of income tax this should be stated in the summons.

maintenance and education of the said infant *M. J. W.*, as from the 1st day of January, 1888, and for the time to come during her minority, or till further order.

3. That the annual sum of *l.* may be allowed for the maintenance and education of the said infant *N. W.*, as from the 1st day of January, 1888, and for the time to come during her minority, or till further order.

4. That the said allowances may be paid to the said *A. W.*, as the guardian of the said infants, by *E. C.* (the executrix of the late *A. G. C.*, who was an executor of the late *G. W.*, the father of the said infants), or by *A. W. G.*, the surviving executor of the said *G. W.*, by equal half-yearly payments of *l.* each out of the interest to accrue from time to time upon the sum of *l.* India Three-and-a-Half per Cent. Stock, and *l.* like stock respectively, standing in the names of the said *E. C.*, and forming part of the estate of the said *G. W.*, or upon the surplus or residue of such stock, which will remain after the sale hereinafter mentioned, and out of the sum of [x] *l.*, in the hands of Messrs. *, bankers, at , aforesaid, to the credit of the said E. C., as the executrix of the said A. G. C., and forming part of the estate of the said G. W., and (after the said sum of l. shall be exhausted) out of the proceeds of such sale the first of such half-yearly payments to be made in the month of July, 1888.*

5. That after the said sum of [x] *l.* shall have been exhausted by the payments thereout aforesaid, so much of the said India Three-and-a-Half per Cent. Stock may from time to time be sold as will from time to time, with the interest to accrue on such stock, be sufficient to pay the said half-yearly sums of *l.* each.

6. Or that the said sums of *l.* India Three-and-a-Half per Cent. Stock, and *l.* like stock and [x] *l.* cash in the said bank, may respectively be transferred and paid to the said *A. W.*, as such guardian of the estate as aforesaid, with liberty to apply the same from time to time in manner aforesaid.

7. And that the costs of this application may be taxed as between solicitor and client, and that the same may be paid out of the said sum of [x] *l.*, or that such costs may be otherwise properly provided for.

Dated, &c.

[Conclude as in Form 1, p. 334, addressing the summons to the said *E. C.*, the said *A. W. G.* having renounced probate.]

13. CONSENT OF GUARDIAN TO ACT.

[Title as in Form 12.]

I, *A. W.*, of *, in the county of , spinster, hereby consent to act as guardian of the persons and estates of the above-named infants M. J. W. and N. W.*

Dated this *day of , 1888.*

(Signed) *A. W.*

I, *O. H.*, of *, in the county of , solicitor, hereby*

certify that the above written signature is the signature of *A. W.*, the person mentioned in the above written consent. (*a*)

14. AFFIDAVIT OF FITNESS OF PROPOSED GUARDIAN.

[*Title as in Form 12.*]

I. M. B., of _____, in the county of _____, spinster, make oath and say as follows :

1. I have for nineteen years last past known and been well acquainted with *A. W.*, of _____, in the county of _____, spinster, the person proposed to be appointed guardian of the persons and estates of the above-named infants during their respective minorities, or until further order.

2. The said *A. W.* has for twenty-seven years and upwards last past resided at _____, aforesaid, and during the life of her father *G. W.*, deceased, assisted him in the management of his business or trade of draper, in _____, aforesaid, and has, since his death, herself carried on the said business.

3. The said *A. W.* is a person of good credit and of thorough respectability and integrity, and I verily believe her to be a fit and desirable person to be appointed guardian of the persons and estates of the said infants.

Sworn, &c.

15. AFFIDAVIT FILED IN SUPPORT OF SUMMONS, FORM 12.

[*Title as in Form 12.*]

I. A. W., of _____ in the county of _____, spinster, the next friend of the above-named infants and their half-sister, make oath and say as follows :—

1. I am the person whom it is proposed to appoint the guardian of the persons and estates of the above-named infants *M. J. W.* and *N. W.*

2. The said *M. J. W.* was born on or about the _____ day of _____, 187____, and is now of the age of _____ years, and the said *N. W.* was born on the _____ day of _____, 187____, and is now of the age of _____ years.

3. Under the will of their father, *G. W.*, late of _____ aforesaid, draper, deceased, and proved on the _____ day of _____ 18____, the said infants are absolutely entitled to two equal undivided third parts or shares of the personal estate of the said *G. W.* Such estate now consists of the following particulars :

l. India Three-and-a-Half per Cent. Stock standing in the name of *A. G. C.*, of _____, now deceased, the late legal personal representative of the said *G. W.* and _____ *l.* dividends thereon.

l. like stock standing in the same name and representing the sum of _____ *l.*, part of the purchase money of the stock-in-

(*a*) This certificate was accepted in the present case, but Order XXXVIII., r. 19a, only applies in terms to a new trustee. For form of affidavit verifying the above consent, see Dan. F. 1275, which can be readily adapted.

trade and other effects and the goodwill of the business of a draper carried on by the said *G. W.* in his lifetime as hereinafter mentioned.

1. due to the estate from me this deponent and representing the balance of the purchase money of such stock-in-trade and goodwill.

l., balance at the bank of Messrs. , and l., interest on same, standing to the credit of the executor of *G. W.*, deceased, and representing proceeds of sale of furniture belonging to the said *G. W.*

4. The said *G. W.* died on the day of 1886, and his will was proved on the day of 1886, in the district registry at of the Probate Division of Her Majesty's High Court of Justice, by *A. G. C.*, one of the executors therein named, power being reserved to *A. W. G.*, the other executor.

5. The said *G. W.* was, at the time of his death, carrying on the business of a draper in aforesaid, and by his said will he empowered his executors, if they should think fit and with my consent, to dispose of the same.

6. At the date of the death of the said *G. W.* I was and had been for nine years previously assisting him in carrying on the said business of a draper, and by an agreement dated the day of 1886, I agreed with *A. G. C.*, the acting executor of the said will of the said *G. W.*, to purchase part of the stock-in-trade and other effects of the said business and the goodwill thereof at the price of l., being the amount at which the same had been valued by Messrs. , auctioneers and valuers of aforesaid.

The said agreement and valuation respectively are now produced and shown to me and marked with the respective letters and figures *A. W.* 1 and *A. W.* 2.

7. I have paid to the said *A. G. C.* the sum of l., part of the said purchase money of l., and the balance of l. still remains due and owing from me to the estate of the said *G. W.*

8. The only relations of the said *M. J. W.* and *N. W.* now living, are me, this deponent, their half-sister, and *A. H.*, *M. B.*, and *E. B.*, aunts of the said infants, who are living a distance away and take no interest in these children, and they never see anything of them.

9. The said infants *M. J. W.* and *N. W.* are now and have been since the death of the said *G. W.* residing with me at street, aforesaid, and during the whole of that time I have maintained them at my own expense and out of the profits of the said business of a draper which I am now and have been since the death of the said *G. W.*, carrying on for the benefit of myself and infants, and as the only means of maintaining myself and them.

10. The profits of the said business are very small, and, with the exception of their share as aforesaid of the estate of the said *G. W.*, the amount of the annual income whereof is set forth in the schedule hereto, the said infants have no other estate or means of subsistence.

11. The schedule hereto contains a statement of the estimated annual income derivable from the estates of the said infants and

available for their maintenance, and such estimated annual income so available amounts in the whole to the sum of 12*l*.

Half of this sum is properly applicable to the maintenance of the said infant *M. J. W.*, and the other half to the maintenance of the said infant *N. W.*

12. In my judgment and opinion an allowance of *l*. per annum is proper and necessary for the maintenance and education of the said infant *M. J. W.*, and an allowance of *l*. per annum is proper and necessary for the maintenance and education of the said infant *N. W.*, and without this assistance I shall be unable any longer to maintain and support the said infants.

The Schedule above referred to.

<i>l</i> . India Three-and-a-Half per Cent. Stock, less tax	£
Interest at 4 per cent. on <i>l</i> ., balance of purchase money of stock-in-trade as aforesaid, less tax	£
<hr/>	
Total income available ...	£
Two-thirds equals ...	£
Filed, &c.	Sworn, &c.

16. AFFIDAVIT FILED BY THE RESPONDENT TO SUMMONS, FORM 12.

[*Title as in Form 12.*]

I, *E. C.*, of No. , in the county of , widow, make oath and say as follows:—

1. I am the widow and sole executrix of the late *A. G. C.*, of , aforesaid, who was the late legal personal representative of *G. W.*, late of , aforesaid, draper, deceased.

2. The said infants *M. J. W.* and *N. W.* are absolutely entitled under the will of their father, the said *G. W.*, to two equal undivided third parts or shares of the personal estate of the said *G. W.*, which estate now consists of the following particulars:—

	£	s.	d.
300 <i>l</i> . India Three-and-a-Half per Cent. stock standing in the name of the said <i>A. G. C.</i> , as such legal personal representative of the said <i>G. W.</i> , representing the sum of 303 <i>l</i> . 17 <i>s</i> . 6 <i>d</i> . (part of the purchase money of the stock-in-trade, book debts, furniture, and other effects, and the goodwill of the business of a draper, carried on by the said <i>G. W.</i> in his lifetime)	303	17	6
Balance due to the estate from the said Miss <i>A. W.</i> , for part of the stock-in-trade and other effects of the said business, and the goodwill thereof purchased by her	208	0	0
Balance at the bank of Messrs. , standing to the credit of the said <i>A. G. C.</i> , representing the balance of the proceeds of sale, furniture,			

	£	s.	d.
and effects, and book debts, and a sum of money received from the estate of the widow of the said <i>G. W.</i>	68	15	11
	£580	13	5

3. There is a sum of 15*l.* at the said bank standing to the credit of the said *A. G. C.*, in trust for the said *M. J. W.* and *N. W.*, representing the interest on the before-mentioned India Three-and-a-Half per Cent. Stock.

4. I am informed that a sum of 6*l.* is in the hands of my solicitor, Mr. , which will be nearly if not quite exhausted by his bill of costs against the estate previous to the commencement of these proceedings.

5. Most of the book debts have been collected; there are a few outstanding accounts which I consider it will take time to collect, and which may realise about pounds.

6. The sum of *l.* was on the day of , 1886, paid as probate duty upon the inventory of the estate, which was estimated at 550*l.*

7. I consider the said *A. W.* is a fit person to be appointed guardian of the said infants, but as to the propriety of appointing the said *A. W.* guardian of the estate of the said infants, I have no means of judging other than I believe that the said *A. W.* is not a person of substance, and depends solely on the profits from the business of a draper carried on by her, which business is not extensive. (a)

Sworn, &c.,

17. ORDER MADE ON SUMMONS, FORM 12.

day the day of , 1888.
[Title as in Form 12.]
[Omitting formal parts.]

The judge doth appoint *A. W.*, of street, , in the county of , spinster, guardian of the persons of the above-named infants, *M. J. W.* and *N. W.*, during their respective minorities, or until further order.

And it appearing from the said affidavit of *E. C.* that the share of the said infants in the estate of the said *G. W.*, the father of the infants, may be taken to be represented by the sum of 300*l.* India Three-and-a-Half per Cent. Stock standing in the name of *A. G. C.* deceased, as executor of the said *G. W.*, 15*l.* cash representing dividends thereon, and 68*l.* 15*s.* 11*d.* balance standing to the credit of the said *A. G. C.* with .

It is ordered that the said *E. C.*, as executrix of the said *A. G. C.*, the deceased executor of the said *G. W.*, she by her solicitor submitting to this order, and with the said consent of the said *A. W.*, do on or before the , 1888, make the lodgments into court mentioned in the lodgment schedule hereto of 300*l.* India Three-and-a-Half per Cent. Stock standing in the name of *A. G. C.*, deceased, in the books of the Bank of England as executor of the

(a) Of course the latter portion of this paragraph is not recommended for general use in applications for guardian of the estate.

said *G. W.* deceased, and $\text{£} \quad \text{s.} \quad \text{d.}$ cash, being 15*l.* dividends on such stock, and 68*l.* 15*s.* 11*d.*, the balance standing to the credit of *A. G. C.* with Messrs. $\text{£} \quad \text{s.} \quad \text{d.}$ of $\text{£} \quad \text{s.} \quad \text{d.}$, after deducting $\text{£} \quad \text{s.} \quad \text{d.}$, the amount of the assessed costs of the applicant, and $\text{£} \quad \text{s.} \quad \text{d.}$, the amount of the like costs of the respondent of this application, and $\text{£} \quad \text{s.} \quad \text{d.}$ for maintenance of the said infants to $\text{£} \quad \text{s.} \quad \text{d.}$, 1889.

And it is ordered that the said *E. C.* do pay the applicant's said costs of $\text{£} \quad \text{s.} \quad \text{d.}$ and retain her own said costs of $\text{£} \quad \text{s.} \quad \text{d.}$, out of the said sum so deducted, and also pay the said sum of $\text{£} \quad \text{s.} \quad \text{d.}$ to the said *A. W.* for maintenance of the said infants to $\text{£} \quad \text{s.} \quad \text{d.}$, 1889.

And it is ordered that the annual sum of 30*l.* be allowed for the maintenance and education of the said infants, *M. J. W.* and *N. W.*, during their minority, and be raised and paid to the said *A. W.*, as their guardian, as in the schedule mentioned.

And it is ordered that the funds to be lodged be dealt with as directed by the schedules hereto.

And it is ordered that the sum of 208*l.*, the balance of purchase money due from the said *A. W.*, be taken to represent her share in the estate of the said *G. W.*

And it is ordered that the balance, if any, of the sum of $\text{£} \quad \text{s.} \quad \text{d.}$, and any further sums which may be received in respect of book debts due to his estate respectively referred to in the said affidavit of *E. C.* be paid by her to the said *A. W.*, on account of past maintenance of the said infants.

LODGMET AND PAYMENT SCHEDULE.

In the High Court of Justice,

Chancery Division.

June, 1888.

Re *M. J. W.* and *N. W.*, infants.

Ledger credit. As above.

I. LODGMET.

Particulars of funds to be lodged.	Persons to make the lodgment.	Amounts.	
		Money.	Securities.
		$\text{£} \quad \text{s.} \quad \text{d.}$	$\text{£} \quad \text{s.} \quad \text{d.}$
India 3 <i>l.</i> 10 <i>s.</i> per centum Stock.	E. C.		
Dividends on said India			300 0 0
Stock 15 0 0			
Balance standing to credit of <i>A. G. C.</i> with Messrs.			
at 68 15 11			
$\text{£} \quad \text{s.} \quad \text{d.}$ 83 15 11			
Less costs of applicant of application .. 20 0 0			
Costs of respondent.. 15 0 0			
Maintenance. 20 0 0			
55 0 0			
$\text{£} \quad \text{s.} \quad \text{d.}$ 28 15 11			
	The same.	28 15 11	

II. PAYMENT.

Funds to be dealt with: Funds to be lodged as above.

Particulars of payments, transfers, or other operations ordered.	Payees and transferees or separate accounts.	Amounts.	
		Money.	Securities.
Invest in India 3l. 10s. per centum Stock.		£ s. d. 28 15 11	£ s. d.
On or after the January, the April, the July, and the October, 1889, and on or after the same days in each succeeding year during the minority of the infants <i>M. J. W.</i> and <i>N. W.</i> , sell sufficient India Stock to be lodged and purchased with the dividends to accrue on such India Stock, or the residue thereof, to raise the annual sum of 30 <i>l.</i> by equal quarterly payments of 7 <i>l.</i> 10 <i>s.</i> each free of income tax, the first of such sales to be made on or after the January, 1889.			
Pay proceeds of sale and dividends.	<i>A. W.</i> , of spinster, as guardian.	7 10 0	

18. ORIGINATING SUMMONS FOR APPOINTMENT OF GUARDIAN OF PERSON AND ESTATE AND FOR MAINTENANCE AND OTHER PURPOSES.

1885, M., No.

In the High Court of Justice,
Chancery Division,
Mr. Justice .

In the matter of the estate of *Joseph M.*, deceased.

Between *J. R. M.*, an infant under the age of
twenty-one years, by *E. M.*, his next friend,
Plaintiff,

and

H. C., *E. S. M.*, spinster (the surviving trustee of
the will of the above-named *J. M.*, deceased), and
E. M., spinster, and *E. A. C.*, respectively infants
under the age of twenty-one years,

Defendants.

And in the matter of *J. R. M.*, an infant, by *E. M.*, his
next friend.

And in the matter of an estate called , situate
at , in the county of , settled by will,
dated the day of , 1866, of *R. M.*, deceased.

And in the matter of the Settled Land Act, 1882.

Let [all parties concerned(a)] attend at the chambers of Mr. Justice at the Royal Courts of Justice, at the time specified in the margin hereof, upon the application of the above-named plaintiff *J. R. M.*, the infant tenant in tail under the settlement created by the above-mentioned will of *R. M.*, and a beneficiary under the will of the said *J. M.*, by the above-named *E. M.*, of _____ in the county of _____, spinster, his next friend.

1. That it may be declared by this Honourable Court whether, having regard to the trust for accumulation contained in the will of the testator *J. M.*, deceased, dated the _____ day of _____, 1878, and notwithstanding such trust, the defendants *H. C.* and *E. S. M.*, the surviving trustees of such will, are authorised under sect. 43 of the Conveyancing and Law of Property Act, 1881, to apply the income of a moiety of the residuary estate of the same testator, or any part thereof at their discretion, in and towards the maintenance and education of the infant plaintiff *J. R. M.*

2. If this Honourable Court should not see fit to declare that the said trustees are authorised to apply the income as aforesaid, then that so much of the income of the same moiety as will from time to time be required to effect and keep on foot a policy of assurance in the Life Assurance Office, on the life of the said infant plaintiff *J. R. M.*, for the sum of 2000*l.* for a period of thirteen years, in the names of the defendants *H. C.* and *E. S. M.*, to be held by them as security for recouping the estate of the said testator *J. M.* the loss in the event of the death of the said plaintiff under the age of twenty-one years, of the income which shall have been advanced out of the said moiety for the maintenance and education of such infant plaintiff, and the moneys paid for procuring and keeping on foot the said policy, and also for the costs of obtaining the order or orders to be made hereon (or a proper proportion of such costs), and also such an amount as would be equivalent to the amount which would have arisen from such part of the income of the said moiety as should be so applied in case the same had been accumulated as directed by the said testator's will, and that the balance of the income of the aforesaid moiety of the said residuary estate, after deducting therefrom the amount required to effect and keep on foot the before-mentioned policy of assurance, may be allowed for the maintenance and education of the said infant plaintiff, in respect of his interest under the said testator's will as from the _____ day of _____, 1885, during his minority, or until further order.

3. That the said balance of income as last aforesaid may be paid by the last-named defendants, as trustees of the said testator's estate, to the guardians when appointed of the said infant plaintiff, by equal half-yearly payments, on the _____ day of _____, and the _____ day of _____, the first of such payments to be made on the _____ day of _____, 188 .

4. That it may be declared upon what securities the said defendants *H. C.* and *E. S. M.*, as such trustees as aforesaid, are by their said testator's will authorised to invest the proceeds arising from the sale and conversion of the residuary estate of their said testator.

(a) Instead of the words in brackets it would be better to insert the names, addresses, and descriptions of the respondents.

5. That it may be declared whether the last-named defendants ought to set aside and invest the proceeds of the residuary estate of the said testator in separate moieties, or how otherwise.

6. That the said *E. M.*, the sister of the said *J. R. M.* and *A. M.*, of _____, in _____, in the county of _____, spinster, the paternal aunt of the said *J. R. M.*, or some other proper person or persons, may be appointed the guardians of the person and estate of the said *J. R. M.* during his minority, or until further order.

7. That the whole of the income of all other the estate of the said infant plaintiff *J. R. M.* may be allowed for his maintenance and education, and that such income may be retained and applied by the said *E. M.* and *A. M.*, or other the guardians appointed of the person and estate of the said infant plaintiff on the days hereinbefore appointed for the payment of the other portion of the income of the said infant plaintiff's estate.

8. That the said guardians when appointed may be at liberty to do the necessary repairs to the estate called _____, of which the said infant is tenant in tail in possession, and that the amount required to be expended in and about such repairs may be raised by a mortgage of the said estate, called _____.

9. That *W. B. C.*, of _____, in the county of _____, banker, and *H. W.*, of _____, in the said county of _____, timber merchant, may be appointed trustees of the settlement created by the will of *R. M.*, deceased, for the purposes of the above-mentioned Act, and that the powers conferred upon a tenant for life by sects. 6 to 13 both inclusive, and sects. 16 to 20 both inclusive, of the above-mentioned Act, and all powers ancillary or incidental thereto, may be exercised by the said *W. B. C.* and *H. W.* on behalf of the said *J. R. M.* during his minority.

10. That all necessary directions for the taxation and payment of the costs of the applicants and of all necessary parties appearing on this application may be given.

11. That such other order or direction may be made or given as the circumstances of the case may require.

Dated this _____ day of _____, 188 ____.
[Conclude as in Form 1, p. 334.]

19. STATEMENT OF FACTS.

[Title as in Form 18 or short title.]

Statement of Facts.

1. The above-named *J. M.*, late of _____, in the parish of _____, in the county of _____, gentleman, duly made his will, dated the _____ day of _____ 1878, and after making divers specific bequests, the said will proceeded as follows: "All the rest, residue, and remainder of my real and personal estate of what kind or nature soever, and wheresoever situate, I give, devise, and bequeath unto the said *John M.*, *H. C.*, *W. P.*, and *E. S. M.*, their heirs, executors, and administrators, according to the nature and tenure of the same (they being hereinafter called the trustees), upon trust to get in and convert into money, as soon as conveniently may be, all such of my said residuary estate as shall not consist of cash or money at my decease, with full powers of sale, and of realisation of

every part of the same; and out of the proceeds thereof do in the first place pay and discharge my funeral and testamentary expenses, and any debts I may owe at my decease. And in the next place do pay a legacy of 19*l*. 19*s*. to each of the children who may then be living (and be resident in England or Wales) of my late brothers *J. M.* and *J. M.*, and do stand possessed of the remaining residuary estate and the stocks, funds, and securities upon which the same may be invested, upon trust as to one moiety or half part thereof, to invest the same upon Government, East India, or British Colonial stocks or funds, or in or upon real securities in England or Wales, or the stocks and shares of any company carrying on business in the United Kingdom, but not elsewhere, and to pay the net interest, dividends, and annual income of the same unto my said niece *E. S. M.*, for her life, for her sole and separate use and benefit, exclusive of, and not to be subject to, the control, debts, or engagements of any husband with whom she may intermarry, and without any power of alienation, charge, or anticipation of any part of the income, which, notwithstanding any such, shall always be payable and paid by the trustees into the proper hands of the said *E. S. M.* for her own personal use and benefit. And upon and from her death upon trust as to the principal moneys of such moiety of my said residuary estate, and the stocks, funds, and securities whereon the same may be then invested, for all and every, or such one or more of the children of the said *E. S. M.* (in case of her marriage and issue therefrom) as she shall by deed or will appoint, and in default of appointment the same to be equally divided between all the children (if more than one) of the said *E. S. M.* share and share alike, and if but one, then to such only child, such share or shares to be vested on such child or children respectively attaining twenty-one years of age, or dying under that age, having married and leaving issue; and in default of issue of the said *E. S. M.* upon trust as to such moiety of the same residuary estate, and the stocks, funds, and securities upon which the same may be invested, upon trust to pay and divide the same equally between all the then surviving children of my said nephew *John M.*, and of my said niece *L. E. C.* (wife of the said *H. C.*) equally between them share and share alike as tenants in common, their executors, administrators, and assigns, for their own use and benefit; and as to the other or remaining moiety or half part of my said residuary estate, and the stocks, funds, and securities upon which the same may be invested, upon trust to receive the dividends, interest, and annual income thereof, and to invest the same from time to time in and upon other securities of the like nature as hereinbefore mentioned, and to accumulate such income and invested income until the eldest son of my said nephew *John M.*, who may live to attain the age of twenty-one years, shall attain such age, and then immediately thereupon to pay over and transfer the principal of such last moiety of the said residuary estate, together with all accumulations of such dividends, interest, and income, and the stocks, funds, and securities upon which such principal and accumulated income may have been invested, to such eldest son of my said nephew on his so attaining such age of twenty-one years for his own use and benefit absolutely: Provided that if it shall happen that no son of my said

nephew *John M.* shall live to attain the age of twenty-one years, and become entitled to the said moiety of my residuary estate, and such accumulated income thereof, then I give and bequeath the same unto and equally between and amongst all the then surviving daughters of the said *John M.*, and the issue of such of his daughters as may be then deceased leaving issue (such issue nevertheless taking between them the share of their deceased mother *per stirpes* and not *per capita*), and the then surviving children of the said *L. E. C.* (and the issue of such of them then dead leaving issue in like manner), share and share alike as tenants in common for their own use and benefit. I appoint the said *John M.*, *H. C.*, *W. P.*, and *E. S. M.* to be trustees and executors of this my will (hereby revoking all former wills by me at any time heretofore made), and I give to each of them the sum of 19 guineas for their trouble in carrying out the same in addition to any legacy which either of them may be otherwise entitled to under this my will. And I expressly authorise and empower them to continue all or any part of my personal estate in or upon any of the securities or investments upon which the same may be at the time of my decease, and from time to time, at their discretion, to realise the same, or any part or parts thereof, as they may think fit, and reinvest the proceeds for the purpose of the then subsisting trusts of this my will in other securities or investments of the same nature and character, or of those before specified, as those on which my residuary trust estate may be invested, and from time to time to alter and vary the same as they in such their discretion may think fit without being in any way liable or accountable for any loss or diminution resulting therefrom, it being my express direction that my said trustees and executors shall not be confined to such investments as trustees are ordinarily limited to and allowed to make by law, but shall have free and absolute discretion in the management and investment thereof."

2. The testator made a codicil, dated the day of , 1879, to his said will, but such codicil is not material to this matter.

3. The said testator died on the day of , 1883, without having revoked or altered his said will; and on the day of , 1883, the same will was proved by all the said executors therein named, in the District Registry of the Probate Division of the High Court of Justice.

4. The debts and funeral and testamentary expenses of the said testator, and the pecuniary legacies bequeathed by his said will, have been paid, and his residuary estate now consists of the following, viz.:

[*Here insert short particulars.*]

5. All the said investments were existing at the death of the testator, except the said mortgage for £, which sum represents certain securities of the said testator which have been got in since his death. There are moreover accumulations of income of the moiety of the residuary estate of the said testator contingently bequeathed to the plaintiff *J. R. M.* as aforesaid, such accumulations at the present amount to the sum of 200*l.* or thereabouts.

goldsmith, and *S. W.*, the wife of the said *H. W. W.*, of _____, in the county of _____, a clerk in _____, legatees in trust under the will of the above-named testator *C. W.* and *A. R. W.* of _____, spinster, *H. C. W. W.* of the same place, _____ *C. W. F. W.* of the same place, _____ and *P. W. W.* and *M. S. W.* both of the same place respectively, infants, all of whom are or claim to be residuary legatees and *cestuis que trust* under the said will, and the defendants *S. T.* and *W. N.*, the surviving executors of the will of the late *H. R. W.*, who was a brother, and one of the next of kin according to the statutes for the distribution of intestates' effects of the said *C. W.*, and the defendant *G. M. D.*, who is a residuary legatee under the said will, attend at the chambers of Mr. Justice _____, at the Royal Courts of Justice, Strand, London, at the time specified in the margin hereof, upon the application of *G. B. S.*, the surviving executor and trustee of the will of the above-named testator *C. W.*, that the following questions [of law and of construction (a)] arising upon the will of the said *C. W.* may be determined under the Rules of the Supreme Court, Order LV., r. 3, sub-sects. (a), (b), and (g). (b)

1. Whether the gift in the said will contained of one-third part of the residue of the stocks, funds, and securities constituting the residuary estate of the said testator in favour of the children of his nephew *H. W. W.* failed to any and what extent by reason of the same infringing the rule against perpetuities or otherwise.

2. If the court shall be of opinion that the said gift failed to any extent, whether the one-third part comprised in the said gift, or any and what part thereof, devolved upon the widow and next of kin of the said testator according to the statute for the distribution of intestates' effects, or how otherwise.

3. Whether the gift in the said will contained of the principal sum directed by the said testator's will to be set apart to meet the annuity of 50*l.*, thereby bequeathed to *E. W.*, failed to any, and if any what, extent by reason of the same infringing the rule against perpetuities, or otherwise.

4. If the court shall be of opinion that such last-mentioned gift failed to any and what extent, whether the principal sum so directed to be set apart, or any and what part thereof, devolved upon the widow and next of kin of the said testator according to the statute for the distribution of intestates' effects, or how otherwise.

5. Who were the next of kin according to the statute for the distribution of intestates' effects of the said *C. W.*, deceased, living at the time of his death, and whether any of them are since dead, and if so, who are their respective legal representatives.(c)

(a) The words here in [] are optional when applicable. The rule against perpetuities is a rule of law as distinguished from one of construction.

(b) In Dan. F., 1146, the following words are here added, viz.: "And relief given in respect thereof without an administration of the estate of the said *C. W.*." Such words follow the language of Order LV., r. 3, and are a convenient but not a necessary part of the summons.

(c) Upon the hearing of this summons the court declared that the gift in question failed as being a perpetuity, and that there was accordingly

6. How the costs of and incidental to this application are to be borne.

Dated this day of , 188 .

This summons was taken out by *A. B.*, of , in the county of , agent for *C. D.*, of , in the county of , solicitor for the above-named *G. B. S.*

To the above-named *C. J. H.*, *S. W.*, the wife of the said *H. W. W.*, *A. R. W.*, spinster, *H. C. W. W.*, *C. W. F. W.*, and *P. W. W.*, and *M. S. W.* respectively, infants, and *S. T.* and *W. N.*, and *G. W. D.* (a)

NOTE.—If you do not attend either in person or by your solicitor [at the time and place above mentioned], (b) such order will be made and proceedings taken as the judge may think just and expedient.

Before you will be heard in chambers, you will have to enter an appearance in the central office and give notice of such appearance.

21. STATEMENT OF FACTS IN SUPPORT OF SUMMONS, FORM 20. (c)

[*Title as in Summons.*]

1. This is an application by the surviving executor for the purpose of obtaining the declaration of the court as to whether a gift of a share of the residuary estate is or is not void by reason of the gift in terms infringing the rule against perpetuities.

2. The testator *C. W.*, formerly of , in the parish of , in the county of , and of , goldsmith, by his will, dated the day of , 1870, appointed his brother *H. R. W.*, his (testator's) wife *H. W.*, *R. W.*, spinster, the above-named plaintiff, and *C. R.*, and *W. N.* (thereinafter referred to as his the testator's trustees), trustees and executors of that his will. And after giving certain pecuniary and specific gifts gave, devised, and bequeathed all the residue and remainder of his real and personal estate and effects upon trust to sell and dispose of and convert into money all his residuary real and personal estate, or such parts thereof as should not consist of money, or investments, or securities, and to collect and recover all debts owing to him, and to adjust, settle, and wind-up all his accounts, affairs, and con-

an intestacy. And an inquiry as to next of kin was ordered, and the plaintiff was ordered to pay the costs of the first seven defendants the residuary legatees out of the residue, and they were dismissed from the summons. Further consideration was adjourned in chambers. As a rule class inquiries and inquiries as to facts would precede the declaration of the court as to the rights of the parties.

(a) Where the addresses and descriptions of the defendants are given in the body of the summons it is unnecessary to repeat them here.

(b) If the time has been altered by indorsement, instead of the words in [] insert, "at the place abovementioned at the time mentioned in the indorsement hereon."

(c) As to "Statement of Facts," see *ante*, p. 10. This form was not settled by counsel.

cerns, and to adjust, compromise, and refer to arbitration and release any debt, demand, and dispute which might exist or be owing to or from, or be made on behalf of or against or arise in relation to, his real and personal estate and effects and the business carried on by him in partnership with his brother, the said *H. R. W.* And the said testator declared that his said trustees should stand possessed of the moneys to arise from such sale, conversion, and getting in of his residuary real and personal estate and effects, and also of all the ready money which he should be possessed of at his death, after payment of costs, charges, and expenses of and incident to the execution of the trusts and powers reposed and vested in his trustees, upon trust to lay out, invest, and set apart so much of the residue of the said moneys in their names, either in the public funds, or in the debentures or debenture stock or guaranteed stock of any English or Indian railway company, as would from time to time be sufficient to produce an income of 50*l.* annually for the benefit of his the said testator's sister *E. W.*, as in the said will is particularly mentioned. And the said will then proceeded as follows: (a) "And after the decease of my said sister *E. W.*, upon trust, subject to the proviso next hereinafter contained, to pay the principal sum so invested and set apart as aforesaid to the said *C. J. H.* and *S. W.*, the wife of my nephew *H. W. W.*, a clerk in _____, upon the like trusts and for the like purposes as are hereinafter declared of and concerning one-third part of my residuary personal estate hereinafter bequeathed to them: provided always, and I declare, that in case my said sister *E. W.* shall die in the lifetime of my said wife, or of my said sister *R. W.*, then my trustees are to pay the income of 50*l.* per annum yearly and every year by half-yearly instalments to my said wife during her lifetime, and after the decease of my said wife to pay the same yearly and every year by half-yearly instalments to my said sister *R. W.* during her life for her separate use and benefit." And the said will provided for the reinvestment of the balance of the moneys constituting the said testator's residuary estate as therein particularly mentioned, and directed his trustees to pay the interest, dividends, and annual proceeds of such investments to his wife during her life, and after the decease of his said wife to pay the same to his said sister *R. W.*, and after the death of his said sister, and after payment of certain pecuniary legacies, one of which has lapsed by reason of the death of the legatee, the said testator directed his trustees to pay and transfer one-fourth part of one-third of the said residuary estate to each of the four daughters of his brother-in-law *J. H. D.*, for her own use and benefit, and the said will then proceeded as follows: "And as to one other third part of the residue of the said stocks, funds, and securities, upon trust to pay and transfer the same to the said *C. J. H.* and *S. W.*, the wife of my nephew *H. W. W.*, to be held by them in trust for all the children, or any the child of my said nephew living at my death or afterwards to be born, who being a son or sons shall attain the age

(a) The clauses of the will on which the opinion of the judge is required should be set out *verbatim*.

of twenty-five years, or being a daughter or daughters shall attain the age of twenty-one years, or marry under that age, to be divided between such children if more than one in equal shares." And as to the remaining one-third of the said residuary estate, the said testator directed that the same should be held upon trust to pay and transfer the same to the said *C. J. H.* and *J. V. T. D.*, to be held by them in trust for the six children of the said *J. V. T. D.*, by his wife *J. D.*, since deceased, as to sons on their attaining the age of twenty-five years, and as to daughters on their attaining the age of twenty-one years, or marrying under that age, to be divided between them the said children in equal shares.

3. The said testator *C. W.* died on the day of , 1874, and his said will was proved on the day of , 1874, by the said *H. R. W.*, *H. W.*, the plaintiff, and *C. R.*, four of the executors named in the said will, power being reserved to the said *R. W.* and *W. N.* to come in and prove the said will.

4. Neither the said *R. W.* or *W. N.* ever proved the said will of the said testator.

5. The said *R. W.*, the above-named executrix and annuitant, died on the day of , 1883, unmarried and intestate, and no representation to her estate has been obtained. The said *E. W.*, the above-named annuitant, died on the day of , 1879, also unmarried and intestate, and no representation to her estate has been taken out.

6. The said testator's estate was duly converted and got in, and the legacies given by his will (save as to the legacy given to the defendant *C. J. H.*) and the whole of his debts and funeral and testamentary expenses have been paid, and such residuary estate now consists of the following particulars.

[Here insert short particulars.]

7. The said testator was not possessed of any real estate whatsoever.

8. No fund was ever set apart as directed by the said testator's will to answer the payment of the annuity of 50*l.* so as aforesaid given by the said testator, in the first place to his sister *E. W.*, then to his said wife, and afterwards to his sister *R. W.* During the lifetime of the said *E. W.* her annuity was paid or satisfied out of the general income of the said testator's estate, and the said testator's sister *R. W.* did not survive the said testator's wife.

9. The testator's widow, the said *H. W.*, died on the day of , 1886, intestate, and administration to her estate was, on the day of , 1886, granted to her brother *J. H. D.* her only next of kin.

10. Plaintiff's co-executor, the said *H. R. W.*, died on the day of , 1884, and his will, with a codicil thereto, was duly proved in the principal registry of the Probate Division of Her Majesty's High Court of Justice on the day of , 1884, by the above-named defendants *S. T.*, the surviving executor named in the will, and *W. N.*, the executor named in the codicil to the will of the said *H. R. W.*, deceased.

11. The four daughters of his the testator's, *C. W.*, brother-in-law *J. H. D.*, referred to in the said testator's will, claiming to be

interested between them equally in one-third part of the said testator's residuary estate, are *L. H. D.*, *C. A. D.*, *C. A. E. D.*, and the defendant *G. M. D.*, who are all above the age of twenty-one.

12. The children of the said testator's nephew *H. W. W.*, claiming to be interested under the will of the said testator equally between them in the one-third part of the residuary estate of the said testator, are the several defendants, *A. R. W.*, *H. C. W. W.*, *C. W.*, *F. W.*, *P. W. W.*, and *M. S. W.*

13. The six children of *J. V. T. D.*, by his wife *J. D.*, since deceased, claiming to be interested equally between them, under the said testator's will, to one-third of the said testator's residuary estate are the following, viz., *W. S. D.*, *B. K. D.*, now the wife of *A. L. C.*, *H. H. D.*, *A. L. D.*, *G. P. D.*, and *E. J. D.*

14. The next of kin of the said testator at the time of his death are supposed to have been as follows: the said testator's nephew *H. W. W.*, the said testator's brother *H. R. W.* (whose representatives are defendants in these proceedings), and the said testator's sisters the said *R. W.* and *E. W.*, and they or some of them, and the said testator's widow *H. W.*, who, as aforesaid, survived the testator, or their representatives, would be entitled in distribution to any of the said residuary estate of the said testator not disposed of by his will.

15. Doubts as to who are the testator's next of kin however having arisen, in the event of the testator's next of kin being declared entitled, it will be necessary to direct an inquiry as to who are such next of kin.

22. AFFIDAVITS FILED IN SUPPORT OF SUMMONS, FORM 20. (a)

[*Title as in summons.*] (b)

I, *G. B. S.*, of _____, in the county of _____, silversmith, make oath and say as follows:

1. I am the plaintiff above named.

2. *C. W.*, formerly of _____, in the parish of _____, in the county of _____, and of _____, in the parish of _____, in the same county _____, by his will, bearing date the day of _____, 1870, appointed his brother *H. R. W.*, his (the testator's) wife *H. W.*, *R. W.* (spinster), myself, the above-named plaintiff, and *C. R.* and *W. N.* (thereinafter referred to as his the testator's trustees), trustees and executors of that his will, and after giving certain pecuniary and specific gifts, gave, devised, and bequeathed all the residue and remainder of his real and personal estate and effects upon trust to sell and dispose of and convert into money all his residuary real and personal estate, or such parts thereof as should not consist of money or investments or securities, and to collect and recover all debts owing to him, and to adjust

(a) As to evidence generally see *ante*, p. 29, *et seq.*, and p. 92.

(b) Save and except that, as there are several defendants, it will be sufficient to state the name of the first defendant in full and to refer to the rest as "and others." See *ante*, p. 40.

settle, and wind-up all his accounts, affairs, and concerns, and to adjust, compromise, and refer to arbitration, and release any debt, demand, and dispute which might exist or be owing to or from, or be made on behalf of or against, or any wise in relation to, his real and personal estate and effects, and the business carried on by him in partnership with his brother, the said *H. R. W.*, and the said testator declared that his trustees should stand possessed of the moneys to arise from such sale, conversion, and getting in of his residuary real and personal estate and effects, and also of all the ready money which he should be possessed of at his death, after payment of costs, charges, and expenses of and incident to the execution of the trusts and powers reposed and vested in his trustees, upon trust to lay out, invest, and set apart so much of the residue of the said moneys in their names, either in the public funds or in the debentures or debenture stock or guaranteed stock of any English or Indian railway company, as would from time to time be sufficient to produce an income of 50*l.* annually for the benefit of his (the testator's) sister *E. W.*, as in the said will is particularly mentioned. And the said will then proceeded as follows: "And after the decease of my said sister *E. W.*, upon trust, subject to the proviso next hereinafter contained, to pay the principal sum so invested and set apart as aforesaid to the said *C. J. H.* and *S. W.*, the wife of my nephew *H. W. W.*, upon the like trusts and for the like purposes as are hereinafter declared of and concerning one-third part of my residuary personal estate hereinafter bequeathed to them. Provided always, and I declare, that in case my said sister *E. W.* shall die in the lifetime of my said wife or of my said sister *R. W.*, then my trustees are to pay the income of 50*l.* per annum yearly and every year by half-yearly instalments to my said wife during her life, and after the decease of my said wife to pay the same yearly and every year by half-yearly instalments to my said sister *R. W.* during her life for her separate use and benefit." And the said will provided for the investment of the balance of the moneys constituting the said testator's residuary estate as therein is particularly mentioned, and directed his trustees to pay the interest, dividends, and annual proceeds of such investments to his wife during her life, and after the decease of his said wife to pay the same to his said sister *R. W.*, and after the death of his said sister, and after payment of certain pecuniary legacies, one of which has lapsed by reason of the death of the legatee, the said testator directed his trustees to pay and transfer one-fourth part of one-third of the said residuary estate to each of the four daughters of his brother-in-law *J. H. D.*, for her own use and benefit. And the said will then proceeded as follows: "And as to one other third part of the residue of the said stocks, funds, and securities, upon trust to pay and transfer the same to the said *C. J. H.* and *S. W.*, the wife of my nephew *H. W. W.*, to be held by them in trust for all the children or any the child of my said nephew living at my death or afterwards to be born, who, being a son or sons, shall attain the age of twenty-five years, or being a daughter or daughters, shall attain the age of twenty-one years, or marry under that age, to be divided between such children, if more than one, in equal shares." And as to the remaining one-third of the

said residuary estate, the said testator directed that the same should be held upon trust to pay and transfer the same to the said *C. J. H.* and *J. V. T. D.*, to be held by them in trust for the six children of the said *J. V. T. D.* by his wife *J. D.*, since deceased; as to sons, on their attaining the age of twenty-five years, and as to daughters, on their attaining the age of twenty-one years, or marrying under that age, to be divided between the said children in equal shares.

3. The said testator *C. W.* died on the day of , 1874, and his said will was proved on the day of , 1874, by the said *H. R. W.*, *H. W.*, myself, and *C. R.*, four of the executors named in the said will, power being reserved to the said *R. W.* and *W. N.* to come in and prove the said will. The probate of the said will is now produced to me marked S'.

4. Neither of them the said *R. W.* and *W. N.* has ever come in and proved the said will of the said testator.

5. The said *R. W.*, the above-named executrix and annuitant, died on the day of 1883, unmarried and intestate, and the said *E. W.*, the above named annuitant, died on the day of , 1879, also unmarried and intestate.

6. The said testator's estate was duly converted and got in, and the legacies given by his will (save as to the legacy given to the defendant *C. J. H.*) and the whole of his debts and funeral and testamentary expenses have been paid, and such residuary estate now consists of the following particulars:

[*Here insert short particulars.*]

7. The said testator was not possessed of any real estate whatsoever.

8. No fund was ever set apart as directed by the said testator's will to answer the payment of the annuity of 50*l.* so as aforesaid, given by the said testator in the first place to his sister *E. W.*, then to his wife, and afterwards to his sister *R. W.* During the lifetime of the said *E. W.*, her annuity was paid or satisfied out of the general income of the said testator's estate, and the said testator's sister *R. W.* did not survive the said testator's wife.

9. The said testator's widow the said *H. W.* died on the day of 1886 intestate, and administration to her estate was on the day of 1886, granted to her brother *J. H. D.*, her only next of kin.

10. My co-executor, the said *H. R. W.*, died on the day of 1884, and his will with a codicil thereto was duly proved in the Principal Registry of the Probate Division of Her Majesty's High Court of Justice on the day of 1884, by *S. T.* the surviving executor named in the will, and *W. N.* the executor named in the codicil to the will of the said *H. R. W.* deceased.

11. The four daughters of his the testator's brother-in-law *J. H. D.* referred to in the said testator's will, claiming to be interested between them equally in one-third part of the said testator's residuary estate are, *L. H. D.*, *C. A. D.*, *C. A. E. D.*, and the defendant *G. M. D.*, who are all above the age of twenty-one.

12. The children of the said testator's nephew, *H. W. W.*, claiming to be interested under the will of the said testator,

equally between them, in the one-third part of the residuary estate of the said testator, are the several defendants, *A. R. W.*, *H. C. W. W.*, *C. W. F. W.*, *P. W. W.*, and *M. S. W.* As to the claim of the last-named children, I have been advised that the gift contained in the said will of the said testator, *C. W.*, is bad by reason of the same gift in terms infringing the rule against perpetuities.

13. The six children of *J. V. T. D.*, by his wife, *J. D.*, since deceased, claiming to be interested equally between them under the said testator's will to one-third of the said testator's residuary estate are the following, viz., *W. S. D.*, *B. K. D.* (now the wife of *A. L. C.*), *H. H. D.*, *A. L. D.*, *G. P. D.*, and *E. J. D.*

14. I am advised that the next of kin of the said testator, at the time of his death, are supposed to have been as follows: The said testator's nephew, *H. W. W.*; the said testator's brother, *H. R. W.*; and the said testator's sisters, the said *R. W.* and *E. W.*, and they or some of them, and the said testator's widow, *H. W.*, who as aforesaid survived the testator, or their representatives, would be entitled in distribution to any of the said residuary estate of the said testator not disposed of by his will.

15. I am advised that no representation to the estates of the said *E. W.* and *R. W.* have yet been obtained.

16. I am also advised that doubts have been suggested and have arisen as to who really are the said testator's next of kin.

Sworn at , in the county of ,
the day of 188 ,

Before me,

A. B.

A Commissioner to administer Oaths in the
Supreme Court of Judicature in England.

Filed on behalf of the plaintiff.

[*Title as in Form 20.*]

I, *S. W.* (the wife of *H. W. W.*, of , in the county of), one of the above-named defendants, make oath and say as follows:—

1. On the day of , 1859, I then being a spinster, was married to *H. W. W.*, he then being a bachelor; and the persons "*H. W. W.* and *S. P.*," respectively appearing in the paper writing now produced to me, marked *S. W.*, being a certificate of our marriage, are the same persons as myself and my said husband.

2. There has been issue of the said marriage seven children, and no more; that is to say, *M. L. W.*, who was born on , 1859, *A. R. W.*, who was born on the , 1860, *H. C. W. W.*, who was born on the , 1862, *C. W. F. W.*, who was born on the 1863, *A. D. W.*, who was born in the year 1864, *P. W. W.*, who was born on the , 1866, and *M. S. W.*, who was born on the , 1870.

3. The said last-mentioned five children are the five above-named defendants of the same name, save that my daughter is called in the summons in this matter.

4. My said husband is the same person as the testator, *C. W.*'s, nephew, *H. W. W.*, named in his will in question in this matter.

5. I am now of the age of fifty-five years, and my said husband is now of the age of fifty-six years.

6. Two of my said above-named children, viz., *M. L. W.* and *A. D. W.*, are dead; the said *M. L. W.* died in the year 1873, and the said *A. B. W.* died a baby in the year 1865.

Sworn, &c.,

Filed, &c.

23. ORIGINATING SUMMONS BY TWO OUT OF THREE TRUSTEES AND EXECUTORS AGAINST A THIRD, WHO WAS ALSO A BENEFICIARY, FOR DETERMINING QUESTIONS OF CONSTRUCTION AND ADMINISTRATION ARISING UPON A WILL.

In the High Court of Justice.

Chancery Division.

Mr. Justice

In the matter of the estate of *T. N.*, deceased.

Between *J. P.* and *B. B.* the younger, Plaintiffs,
and

L. N., widow, *R. S.*, *H. P.*, and *J. O. N.*, Defendants.

Let the defendants, *L. N.*, widow, a trustee of and beneficiary for life under the will of the above-named *T. N.*, and *R. S.* and *H. P.*, the devisees in trust of the real and personal estate of *E. N.*, who was a devisee, legatee, and *cestui que trust* under the same will, and *J. O. N.*, the heir-at-law of the late *F. L. N.*, who was a devisee, legatee, and *cestui que trust* under the same will, and also heir-at-law of the late *H. T. N.*, who was, or claimed to be a devisee, legatee, and *cestui que trust* under the same will, attend at the chambers of Mr. Justice , at the Royal Courts of Justice, Strand, London, at the time specified in the margin hereof upon the application of *J. P.*, of aforesaid, innkeeper, and *B. B.*, of , in the county of , farmer (formerly *B. B.* the younger), two of the trustees and executors of the will dated the day of , 18 , of the said *T. N.* that the following questions [of construction and administration (*a*)] arising upon the will of the said *T. N.* may be determined under the Rules of the Supreme Court, Order LV., r. 3, sub-sect. (*g*), and r. 4. (*b*)

1. Whether *H. T. N.*, *E. N.*, and *F. L. N.*, the three children of the said testator or any and which of them respectively, took vested interests in the real and personal estate of the said testator, or the moneys to arise by the sale and receipt thereof or any part thereof respectively under or by virtue of the said will, and at what time they respectively acquired such vested interests.

2. What children of the said testator were intended to take his said real and personal estate or any part thereof under the description contained in the said will of "all and every my child and children who shall be living."

3. Whether the real estate of the said testator or any part thereof ought, under the trusts or provisions of the said will, to be treated

(*a*) The words here in brackets are optional when applicable.

(*b*) See note (*b*) to Form 20, *ante*, p. 357.

as converted into personal estate as from the death of the said testator or from any other and what period.

4. Whether the plaintiffs and defendant, *L. N.*, as such trustees and executor as aforesaid will be justified in paying off a certain mortgage debt of *L.* and interest due from the testator to one *E. M. H.*, or his legal personal representative, out of the proceeds of the sale of part of the real estate of the said testator which is not charged with such mortgage debt.

5. How the costs of this application ought to be borne.

And that (if necessary) the real and personal estate of the said testator may be administered.

Dated this day of , 18 .
This summons was taken out by *A. B.*, of , in the county of , agent for *C. D.*, of , in the county of , solicitor for the above-named *J. P.* and *B. B.* the younger.

To the above-named *L. N.*, of , in the county of , widow; *B. S.*, of , in the county of ; *H. P.*, of , in the county of ; and *J. O. N.*, of in the county of .

NOTE.—If you do not attend either in person or by your solicitor [at the time and place above mentioned (a)] such order will be made and proceedings taken as the judge may think just and expedient.

Before you will be heard in chambers you will have to enter an appearance in the Central Office and give notice of such appearance.

24. STATEMENT OF FACTS IN SUPPORT OF SUMMONS, FORM 23. (b)

[*Title as in Summons.*]

Statement of facts.

1. By his will dated , 1866, *T. N.*, of , carpenter, appointed his wife the defendant *L. N.* during her widowhood only, and the plaintiff *J. P.*, and *B. B.* the younger, joint executrix and executors, and directed that all his just debts, funeral, testamentary, and other expenses should be paid and discharged as soon as conveniently could be after his decease by his said executrix and executors. And after bequeathing to each of his executors 5*l.* he gave unto his said wife such of his household goods, furniture, and effects as she should choose for her use during her life. And at her death he gave the same equally between all his children, and after a specific bequest of provisions, liquor, and fuel in favour of testator's said wife, the said will proceeded as follows: (c) "I give, devise, and bequeath unto my said executrix and executors all my

(a) If the time has been altered by indorsement, instead of the words in [], insert "at the place above-mentioned at the time mentioned in the indorsement hereon."

(b) This form is applicable where the facts are in dispute.

(c) The parts of a will on which the questions turn ought to be set out *verbatim*.

real estate, and all the residue of my personal estate and effects whatsoever, and wheresoever, upon trust that they do and shall permit and suffer my said wife *L.* to have, receive, and take the rents, interest, income, proceeds, and profits of my said real and personal estates and effects for the maintenance of herself and our children until my youngest child attains the age of twenty-five years, if she my said wife so long remains a widow, but no longer. But if she my said wife shall marry again before or after my youngest child attains the age of twenty-five years, then I give unto her my said wife the sum of 15*l.* sterling per annum, payable quarterly in equal portions. And I direct that the same shall be paid into the sole and only proper hands of her my said wife independent of and not in any manner subject or liable to the debts, control, engagements, or interference of any future husband she may chance to marry, and that her receipt or receipts alone, and notwithstanding any future coverture, shall at all times be sufficient discharge for the same; and in case my said wife shall happen to marry again, or to die before my said youngest child shall attain the said age of twenty-five years, I authorise and direct my said executors to apply the said rents, interest, income, proceeds and profits of my said real and personal estates for and towards the maintenance, education, and bringing up my said child and children until the youngest of them shall attain the said age of twenty-five years in such manner as they my said executors shall think proper. And in case my said wife shall be living and not be married again when or after my youngest child attains the age of twenty-five years, then I give unto her my said wife the rents, interest, income, proceeds and profits of one equal half part of my said real and personal estates and property for her sole use and benefit during the term of her natural life, and subject to the receipt and application of the said rents, interest, income, proceeds, and profits of my said real and personal estates in manner, and for the periods, aforesaid, I give, devise, and bequeath all my said real and personal estates, effects, and property whatsoever and wheresoever, or the moneys to arise by sale and receipt thereof unto and equally between and among all and every my child and children who shall be living, and the lawful issue of any of them who may be dead, but such issue to take only the share or shares therein, their deceased parent or respective parents would have taken or been entitled to if living, and to their several and respective heirs, executors, administrators, and assigns as tenants in common and not as joint tenants. And also upon trust that they my said executors and trustees for the time being do and shall, at such time or times as they shall think proper, either in the lifetime of my said wife or during the minority hereby appointed of any of my said children, sell and dispose of my said real estates or any part thereof either together or in lots, and either by public auction or private contract, according to their discretion; and do and shall convey and assure my said real estates to the purchaser or purchasers thereof, and receive and give receipts for the purchase moneys in total discharge of such purchaser or purchasers from all responsibility respecting the application of the same. And I empower my said executors to advance unto or for the benefit of each of my younger children any sum or sums of

money not exceeding 30*l.* each for the purpose of putting them out apprentice or otherwise for their respective benefit without such younger children being liable to account for or make any deduction from their respective shares on account thereof. And I also empower my said executors in their discretion to advance unto each of my children as and when, or at any time after, they shall respectively attain the age of twenty-three years, the sum of 100*l.* in part and on account of their respective shares of my property. And I direct that any moneys coming to the hands of my said trustees for the purposes of this my will shall be invested on such good security as they shall think proper."

2. The said testator died on the 4th April, 1867, and his said will was proved by the defendant *L. N.* and the plaintiffs, the executrix and executors thereof, on the 26th June, 1867, in the District Registry of the Court of Probate.

3. It is alleged (but the defendant *J. O. N.* does not know and therefore does not admit) that in due course after the death of the said testator the said defendant *L. N.* and the plaintiffs as such executrix and executors got in and converted his personal estate (other than such part of his furniture as was scheduled by the defendant *L. N.*, which part is still unconverted and is in the possession of the defendant *L. N.*, and is of the estimated value of £), but that such personal estate was insufficient to pay his debts exclusive of mortgage debts.

4. The following are stated by the plaintiffs and the defendant *L. N.* to be the short particulars of the real estate of which the said testator was seized or possessed at the time of his decease, but no admission is made by the defendant *J. O. N.* as to the correctness of such particulars:—

- (1.) A farm in the said parish of *W.*, called *M.* which was in mortgage to one *B. W.* for securing 300*l.* and interest at 5*l.* per cent. per annum which mortgage was created by one *T. B.* a predecessor in title of the said testator by indenture dated the of 1825.
- (2.) Three cottages in *M.* aforesaid which were mortgaged to *W. T.* and *J. W.* for securing 150*l.* and interest at 5*l.* per cent. per annum, which mortgage was created by the said testator by an indenture dated the of 1862.
- (3.) A messuage or tenement formerly called Inn, situate at *W.* aforesaid with the carpenter's shop and a chapel erected thereon by the said testator, which was mortgaged to one *E.* for securing 200*l.* and interest at 5*l.* per cent. per annum, which mortgage was created by the said testator by an indenture dated of 1853.
- (4.) A messuage in three dwellings, one of which was called the and a saddler's shop and dwelling-house with a garden and orchard situate in *W.* aforesaid, which was mortgaged to the plaintiff *B. B.* the younger for securing 150*l.* and interest at 5*l.* per cent. per annum, which mortgage was created by the said testator by an indenture dated the of 1864.
- (5.) Certain messuages or tenements formerly in three and now in four dwellings adjoining the churchyard in *W.* aforesaid,

which were mortgaged to one *E. M. H.* and still are to his representatives, for securing 200*l.* and interest at 5*l.* per per cent. per annum, which mortgage was created by the said testator by an indenture dated the of 1849, and made between the said testator of the one part and the said *E. M. H.* of the other part.

5. The said testator had, at the date of his said will and death respectively, three children only, namely *H. T. N.*, who was born on the of , 1845, *E. N.*, who was born on the of , 1848, and *F. L. N.*, who was born on the , 1854, and such three children were his sole statutory next of kin.

6. The said *H. T. N.* died intestate and a bachelor on the 1871, leaving the said *F. L. N.* his heir-at-law and the defendant *L. N.* and the said *E. N.* and *F. L. N.* his statutory next of kin, but no letters of administration have yet been taken out to his personal estate.

7. The said *F. L. N.* attained the age of twenty-five years on the of , 1879.

8. The said *E. N.* died on the day of , 1883 without having been married, having by her will devised and bequeathed her real and personal estate to the defendants *R. S.* and *H. P.* upon certain trusts for the benefit of her illegitimate child, who is an infant.

9. The said *F. L. N.* died intestate and a bachelor on the , 1887, leaving his uncle, the defendant *J. O. N.*, his heir-at-law.

10. On the , 1888, letters of administration to the personal estates and effects of the said *F. L. N.* were duly granted to the said defendant *L. N.* by the Probate Division of Her Majesty's High Court of Justice in the principal registry.

11. The defendant *L. N.* has not married again since the death of the said testator.

12. Since the death of the said testator the said defendant *L. N.* and the plaintiffs have, as they allege, sold parts of his real estate, of which particulars are given below. The defendant *J. O. N.* admits that the sales were made, but he does not admit, and is not by agreeing to this statement to be taken as admitting the correctness of any of the figures given or the propriety of the application of any of the purchase moneys.

(1.) The farm called *M.* was sold on the day of , 1867, for 1200*l.*, and the net proceeds of the sale were applied in aid of the personal estate in payment of the testator's debts, funeral and testamentary expenses, the aforesaid legacies, and in discharge of the aforesaid mortgages of 300*l.* to the said *B. W.*, 200*l.* to the said *E. T.*, 150*l.* to the said *B. B.* the younger, leaving (exclusive of the furniture) a cash balance of 60*l.* from which 20*l.* was paid for apprenticing the testator's son *F. L. N.*, and the remainder 40*l.* remained in the hands of the said defendant *L. N.* and the said plaintiffs, and has since been (with the consent of the said defendant *L. N.*) paid or accounted for to the testator's children.

(2.) The three cottages at *M.* were sold on the , 1873,

for 275*l.* and the net proceeds of sale were applied in payment of the principal sum of 150*l.* due on the mortgage of the same premises to the said *W. T.* and *J. W.*, leaving a balance of 98*l.* cash. From this sum 50*l.* was paid to the testator's said daughter *E. N.* and the balance remained in hands of the said defendant *L. N.* and the plaintiffs, and has since been (with the consent of the said defendant *L. N.*) paid or accounted for to the said testator's daughter *E. N.* and the said *F. L. N.*

- (3.) The chapel erected on part of the said premises formerly called _____, with a yard adjoining was sold on _____, 1885, for 175*l.*, which sum was reduced by the expenses of sale to 143*l.*; of this sum two-thirds of one-half part and a sum of 16*l.* were paid or accounted for to the said *F. L. N.* and one-third of one-half part and (with the assent of the said defendant *L. N.*) a further sum of 10*l.* paid or accounted for to the executors of the said *E. N.*, leaving a balance of 45*l.* in hands of the said defendant *L. N.* and the plaintiffs as executors and trustees of the said testator's will.

- (4.) The said messuage in three dwellings, one of which was called the _____, with the saddler's shop, dwelling-house, garden, and orchard, were sold on the _____, 1888, for 780*l.*, from which have been paid the expenses of the sale and certain other costs incurred in relation to the estate of the said testator, amounting altogether to 56*l.*, and the balance, 724*l.* is in the hands of the said defendant *L. N.* and the plaintiffs as executors and trustees of the said testator's will.

13. The unconverted real estate of the said testator (consisting of the said messuage formerly called the _____ and the carpenter's shop, and the said messuages adjoining the churchyard in _____), without deducting the mortgage debt or part thereof, is considered to be of the estimated value of 650*l.* or thereabouts.

14. The sum of 200*l.* with interest thereon from the 10th day of April, 1888, is still due and owing upon the said mortgage to the said *E. M. H.* on the security of the said indenture of the 1849.

15. The plaintiffs are desirous of paying off the said sum of 200*l.* out of the proceeds of the sale of the premises sold on the _____ day of _____, 1888, but the defendant *J. O. N.* objects to their so doing.

16. The questions for the determination of the court appear by the summons.

25. ORIGINATING SUMMONS BY A SURVIVING TRUSTEE AND EXECUTOR FOR DETERMINING QUESTIONS OF CONSTRUCTION AND OF LAW ARISING UPON A WILL.

1886, T., No.

In the High Court of Justice,
Chancery Division,

Mr. Justice

In the matter of the estate of *C. E. T.* deceased.

Between *W. H. W. T.* Plaintiff,
and

W. S. T., *W. L.*, the younger, and

E. T. W., spinster Defendants.

Let the defendants, *W. S. T.*, the heir-at-law of the above-named *C. E. T.*, *W. L.*, one of the residuary legatees under the will of the said *C. E. T.*, and *E. T. W.*, another of such legatees, attend at the chambers of Mr. Justice , at the Royal Courts of Justice, at the time specified in the margin hereof, upon the application of the above-named plaintiff, *W. H. W. T.*, of , in the parish of , in the county of , gentleman, the surviving trustee and executor of the will of the above-named *C. E. T.*, that the following questions [of construction and of law (a)] arising upon the will of the said *C. E. T.* may be determined under the Rules of the Supreme Court, Order LV., r. 3, sub-sects. (e) and (g) (b) namely:

1. Whether the income of the proceeds of the real and residuary personal estate of the said testatrix *C. E. T.* ought to be accumulated by the plaintiff as surviving trustee and executor of the said will until the death of the said *W. S. T.*, or until he has issue who attains twenty-one years of age, or during some other and what period.

2. Or whether there is an intestacy as to such income during the life of the said *W. S. T.* or during any other and what period, and in that case whether such income, so far as it arises from the proceeds of sale of real estate will belong to the heir-at-law of the said testatrix, and so far as it arises from personal estate, will belong to the next of kin, according to the Statute of Distributions, of the said testatrix.

3. How the plaintiff, as such trustee and executor as aforesaid, ought to deal with such income, and who is entitled to the same.

Dated, &c.

[*Conclude as in Form 23, p. 266.*]

**26. STATEMENT OF FACTS IN SUPPORT OF SUMMONS,
FORM 25.**

[*Title as in Summons.*]

1. *C. E. T.*, late of , in the county of , spinster, duly made her will the day of , 1876, and thereby appointed her sister

(a) As to the words here in [], see note (a) *ante*, p. 357.

(b) See note (b) to Form 20, *ante*, p. 357.

L. H. T. and her cousin, the plaintiff, *W. H. W. T.*, executors thereof, and subject to the payment of her just debts, funeral and testamentary expenses, the said testatrix gave and bequeathed divers pecuniary legacies which have some time since been paid and discharged. And the said testatrix gave all her real and residuary personal estate unto her said executors, their heirs, executors, administrators, and assigns, respectively, upon trust to sell, realise, convert, and get in the same, and to hold the proceeds thereof upon trust to pay the income thereof to the said *L. H. T.* during her life, and after her death to pay the same to the said testatrix's brother, the above-named defendant, *W. S. W.*, during his life, and after his death upon trust to pay the capital and the income thereof unto the child or children of the said *W. S. T.*, if only one wholly, and if more than one in equal shares, but in case any of the children of the said *W. S. T.* died leaving issue living at his decease, such issue should take the share which his, her, or their parent would have taken if living, and if more than one the child of each parent should take their parents' share in equal shares, but in case the said *W. S. T.* should die without leaving any issue living at his death, then upon trust to equally divide the same between and among the children then living of the said testatrix's uncle, *W. L.*, and the children of her aunt, *E. W.* And she declared that all moneys payable to any married woman under her said will should be for her separate use, and free from the control of any husband, and her receipt alone should be a sufficient discharge.

2. The said will was attested by two witnesses, one of whom was *E. S. T.*, then and now the wife of the said *W. S. T.*

3. The said testatrix died on the day of , 1876, without having revoked or altered her said will, and on the day of , 1876, the said will was duly proved by the said *L. H. T.* and the plaintiff.

4. In due course, after the death of the said testatrix, the said *L. H. T.* and the plaintiff duly sold and converted into money the real and residuary personal estate of the said testatrix, and out of the proceeds thereof they paid the debts, and funeral and testamentary expenses of the said testatrix, and the legacies bequeathed by her said will, and invested the residue of such proceeds in the purchase of 3046*l.* 10*s.* 8*d.* Three per Cent. Consolidated Bank Annuities, which is now standing in the name of the plaintiff as surviving executor of the said will.

5. The dividends and income of the said sum of 3046*l.* 10*s.* 8*d.* Three per Cent. Bank Annuities were duly paid to the said *L. H. T.* during her life, including a proportionate part of such dividends down to the day of her death.

6. The said *L. H. T.* died on the day of , 1885.

7. The said *W. S. T.* was the heir-at-law of the said testatrix at the time of her decease, and the said *W. S. T.* and the said *L. H. T.* were her next of kin according to the statutes for the distribution of the effects of intestates.

8. The said *L. H. T.* made her will, dated the day of , 1885, and thereof appointed her brother, the defendant, *W. S. T.*, and the plaintiff, executors, who duly proved the same will.

9. The said *W. S. T.* has been married once only, namely, to the

said *E. S. T.* (then *E. S. S.* spinster) in the year 1869. There has been no issue of such marriage. The said *E. S. T.* is of the age of fifty-eight years or thereabouts.

10. Since the death of the said *L. H. T.* no part of the income of the said sum of 304*l.* 10*s.* 8*d.* of Consolidated Three per Cent. Bank Annuities has been paid to the said *W. S. T.*, owing to his said wife having attested the said will.

11. The said *W. L.* died on or about the day of , 1857, leaving seven children, and no more, him surviving, namely, the defendant *W. L.* the younger, *E. L.*, *M. A. L.*, *E. C. L.*, *G. D. L.*, *F. L. D.* widow, and *L. M. L.* All of such children attained the age of twenty-one years, and the said *W. L.* the younger, *E. L.*, *E. C. L.*, *F. L. D.*, and *L. M. L.* are still living. The said *E. C. L.* is in Australia. The said *M. A. L.* died in the month of , 1858, and the said *G. D. L.* died in the month of , 1876.

12. The said *E. W.* died on the day of , 1863, leaving three children, and no more, namely, the defendant, *E. T. W.*, *M. A. W.*, and the Rev. *G. W.* All of such children attained the age of twenty-one years, and the said *E. T. W.* and the Rev. *G. W.* are still living.

13. The said *M. A. W.* died on the day of , 1882, having made her will, dated the day of , 1881, which was duly proved by the said *E. T. W.* the executrix.

The questions to be determined are: (a)

1. Whether the income of the proceeds of the real and residuary personal estate of the said testatrix *C. E. T.* ought to be accumulated by the plaintiff as surviving trustee and executor of the said will until the death of the said *W. S. T.*, or until he has issue who attains twenty-one years of age, or during some other and what period.
2. Or whether there is an intestacy as to such income during the life of the said *W. S. T.*, or during any other and what period, and in that case whether such income, so far as it arises from the proceeds of the sale of real estate, will belong to the heir-at-law of the said testatrix, and so far as it arises from personal estate will belong to the next of kin, according to the Statute of Distributions, of the said testatrix.
3. How the plaintiff, as such trustee and executor as aforesaid, ought to deal with such income, and who is entitled to the same.

27. AFFIDAVIT FILED IN SUPPORT OF SUMMONS, FORM 25. (b)

[*Title as in summons.*] (c)

I, *W. H. W. T.*, of , in the county of , gentleman, the above-named plaintiff, make oath and say as follows:

1. *C. E. T.*, late of , in the county of , spinster, duly made her will, dated the day of , 1876, and thereby appointed her sister *L. H. T.* and her cousin, me this

(a) Or reference may be made to the summons, see p. 370.

(b) As to evidence generally, see *ante*, pp. 27-48 and 92.

(c) As to this, see note (b), *ante*, p. 361.

deponent *W. H. W. T.*, executors thereof, and subject to the payment of her just debts, funeral and testamentary expenses, the said testatrix gave and bequeathed divers pecuniary legacies which have sometime since been paid and discharged. And the said testatrix gave all her real, and residuary personal, estate unto her said executors, their heirs, executors, administrators, and assigns respectively, upon trust to sell, realise, convert, and get in the same, and to hold the proceeds thereof, upon trust to pay the income thereof to the said *L. H. T.* during her life, and after her death to pay the same to the said testatrix's brother, the above-named defendant *W. S. T.* during his life, and after his death upon trust to pay the capital and the income thereof unto the child or children of the said *W. S. T.*, if only one wholly, and if more than one, in equal shares, but in case any of the children of the said *W. S. T.* died leaving issue living at his decease, such issue should take the share which his or their parent would have taken if living, and if more than one the children of each parent should take their parent's share in equal shares, but in case the said *W. S. T.* should die without leaving issue living at his death, then upon trust to equally divide the same between and among the children then living of the said testatrix's uncle *W. L.* and the children of her aunt *E. W.* And she declared that all moneys payable to any married woman under her said will should be for her separate use and free from the control of any husband, and her receipt alone should be a sufficient discharge.

2. The said will was attested by two witnesses, one of whom was *E. S. T.*, then and now the wife of the said *W. S. T.*

3. The said testatrix died on the day of , 1876, without having revoked or altered her said will, and on the day of , 1876, the same will was duly proved by the said *L. H. T.* and me this deponent in the district registry of the Probate Division of the High Court of Justice. The document marked *W. H. W. T.* now produced and shown to me is the probate of the said will.

4. In due course, after the death of the said testatrix, the said *L. H. T.* and I duly sold and converted into money the real and residuary personal estate of the said testatrix and out of the proceeds thereof we paid the debts and funeral and testamentary expenses of the said testatrix and the legacies bequeathed by her said will and invested the residue of such proceeds in the purchase of 304*l.* 10*s.* 8*d.* Three per Cent. Consolidated Bank Annuities, which is now standing in the name of me this deponent as surviving executor of the said will.

5. The net proceeds of the sale of the said testatrix's real estate, after deducting the costs of such sale, amounted to the sum of 317*l.* 11*s.* The gross proceeds of the testatrix's personal estate amounted to the sum of 415*l.* 10*s.* 8*d.*, and the debts, funeral and testamentary expenses and legacies amounted to the sum of 675*l.* 0*s.* 6*d.*, leaving a deficiency of 259*l.* 9*s.* 11*d.*, which was paid out of the said 317*l.* 11*s.* the proceeds of sale of the real estate, the balance of which, namely 2917*l.* 1*s.* 2*d.*, was invested in the purchase of the said 304*l.* 10*s.* 8*d.* Three per Cent. Bank Annuities.

6. The dividends and income of the said sum of 304*l.* 10*s.* 8*d.* Three per Cent. Bank Annuities were duly paid to the said *L. H. T.*

during her life, including a proportionate part of such dividends down to the day of her death.

7. The said *L. H. T.* died on the day of , 1885.

8. The said *W. S. T.* was the heir-at-law of the said testatrix at the time of her decease, and the said *W. S. T.* and the said *L. H. T.* were her next of kin according to the statutes for the distribution of the effects of intestates.

9. The said *L. H. T.* made her will dated the day of , 1885, and thereof appointed her brother the defendant *W. S. T.* and me this deponent executors, who duly proved the same will in the district registry of the Probate Division of Her Majesty's High Court of Justice on the day of , 1885.

10. The said *W. S. T.* has been married once only, namely, to the said *E. S. T.* (then *E. S. S.*, spinster) in the year 1869. There has been no issue of such marriage. The said *E. S. T.* is of the age of fifty-eight years or thereabouts.

11. Since the death of the said *L. H. T.* no part of the income of the said sum of 3046*l.* 10*s.* 8*d.* Consolidated Three per Cent. Bank Annuities has been paid to the said *W. S. T.* owing to his said wife having attested the will.

12. The said *W. L.* died on or about the day of , 1857, leaving seven children and no more him surviving, namely, *W. L.* the younger, *E. L.*, *M. A. L.*, *E. C. L.*, *G. D. L.*, *F. L. D.* widow, and *L. M. L.*; all of such children attained the age of twenty-one years, and the said *W. L.* the younger, *E. L.*, *E. C. L.*, *F. L. D.*, and *L. M. L.* are still living. The said *E. C. L.* is in Australia. The said *M. A. L.* died in the month of , 1858, and the said *G. D. L.* died in the month of , 1876.

13. The said *E. W.* died on the day of , 1863, leaving three children and no more her surviving, namely, *E. T. W.*, *M. A. W.*, and the Rev. *G. W.* All of such children attained the age of twenty-one years, and the said *E. T. W.* and the Rev. *G. W.* are still living.

14. The said *M. A. W.* died on the day of , 1882, having made her will dated the day of , 1881, which was duly proved on the day of , 1882, in the district registry of the Probate Division of the High Court of Justice by the said *E. T. W.* the executrix.

28. ORIGINATING SUMMONS BY TWO TRUSTEES AGAINST THE THIRD, WHO WAS ALSO A BENEFICIARY, AND OTHER BENEFICIARIES, FOR DETERMINING QUESTIONS OF CONSTRUCTION AND OF LAW ARISING UPON A WILL.

In the High Court of Justice. 1887., B., No.
Chancery Division.

Mr. Justice .

In the matter of the estate of *W. H. B.*, deceased.

Between *S. T. H.* and *J. J. C.* ... Plaintiffs,
and

D. G. A. and *E. A.*, his wife, *S. E. B.*,
widow, and *B. D. B.*, an infant under

the age of twenty-one years... Defendants.

Let the defendants *D. G. A.* and *E. A.*, his wife, the said *E. A.*

being a residuary legatee under the will of the above-named *W. H. B.*, and claiming to be absolutely entitled to the residuary estate of the said testator, and the defendant *S. E. B.*, the widow of the late *W. H. G. B.* (a), who was also a residuary legatee under the said will and one of the next of kin of the said testator, and also one of the next of kin of his deceased sister *B. A. B.*, and the defendant *B. D. B.*, an infant under the age of twenty-one years and sole next of kin of the said *W. H. G. B.*, attend at the chambers of Mr. Justice _____, at the Royal Courts of Justice, Strand, at the time specified in the margin hereof, upon the application of *S. T. H.*, of _____, and *J. J. C.*, of _____, two of the trustees of the said will (the defendant *E. A.* being the remaining trustee), that the following questions [of construction and of law (b)] arising upon the will of the said *W. H. B.* may be determined under the rules of the Supreme Court, Order LV., r. 3, sub-sect. *g* (c), that is to say :

1. Whether in the events which have happened the defendants *D. G. A.* and *E. A.* in right of the said *E. A.* are now absolutely entitled, according to the true construction of the will of the said *W. H. B.*, to the residuary estate of the said testator, or what are the respective shares and interests of the defendants in the said residuary estate.

2. Who are now entitled to the said residuary estate, and for what shares and interests.

3. How the trustees of the said will ought to deal with the said residuary estate.

4. How the costs of this application ought to be borne. (d)

Dated, &c.

[*Conclude as in Form 23, p. 366.*]

29. CERTIFICATE OF NO FURTHER ARGUMENT.

1887, B., No.

In the High Court of Justice.

Chancery Division.

Mr. Justice

At Chambers.

W. H. B.'s Estate.

H. v. A.

On the _____ day of _____, 1887, Mr. Justice _____, in chambers, heard a summons, issued the _____, and returnable the _____, 1887, for determining questions or matters arising in the administration of the estate of the above-named testator, and

(a) In this case there was no legal personal representative of *W. H. G. B.* and the judge appointed the defendant *S. E. B.* at the hearing to represent his estate. See Order XVI., r. 46, *ante*, p. 25.

(b) As to the words here in [], see note (a) to Form 20, *ante*, p. 357.

(c) See note (b) to Form 20, *ante*, p. 357.

(d) There was no statement of facts in this case. There was an appeal direct from the judge in chambers to the Court of Appeal, the chief clerk giving the certificate set forth in the next form.

having heard the case fully argued by counsel for the several parties, does not desire to hear any further argument upon it. (a)

Dated the , 1887.

A. B.,
Chief Clerk.

30. NOTICE OF APPEAL.

In the Court of Appeal. [*Title as in Form 28.*]

Take notice that this Court will be moved on day of , 1888, at o'clock in the forenoon, or so soon thereafter as counsel can be heard, by as counsel on behalf of the above-named defendants *D. G. A.* and *E. A.* his wife, that the judgment or order made in this matter and action by His Lordship Mr. Justice , in chambers on the , 1887, may be reversed in part, namely, so far as it declares that the said *E. A.*, by her marriage with the said *D. G. A.* on the , 1868, severed the joint tenancy in such judgment or order referred to, and thereby became entitled to one-third of the residuary estate of the testator, and that the legal personal representative of the deceased *W. H. G. B.*, the longer liver of the two children of the said testator, is entitled to the remaining two-thirds.

And that the Court of Appeal may adjudge or order that the said *E. A.*, by her marriage with the said *D. G. A.* on the , 1868, did not sever the said joint tenancy, and thereby become absolutely entitled to one-third only of the residuary estate of the said testator, but that on the contrary, as the longest liver of the three joint tenants, that is of herself and the two children of the said testator, the said *E. A.* is absolutely entitled to the entire residuary estate of the said testator.

Or in the alternative, if this court shall be of opinion that the said *E. A.*, by her said marriage, severed the said joint tenancy, then that the Court of Appeal may adjudge or order that, according to the true construction of the said will, the said *E. A.* was entitled to an estate or interest during her life in the said residuary estate, with remainder to the said testator's two children.

And further take notice that when this appeal comes on for hearing the said defendants *D. G. A.* and *E. A.* intend to apply for special leave of the Court of Appeal that further evidence on behalf of the same defendants may be admitted upon the said appeal as to the dealings with the trust fund upon the special ground that [the Court ought to be in full possession of the facts]. (b)

Dated the day of , 1888.

C. and D.,

— Inn, Chancery-lane,
Agents for , Solicitors for
the defendants, *D. G. A.* and *E. A.*

To the defendants, *E. B.* widow, and *B. D. B.*
an infant, by the said *S. E. B.*, his mother
and guardian *ad litem*, and to the plaintiffs,
S. T. H. and *J. J. C.*, and to Messrs. ,
their respective solicitors.

(a) As to the practice on appeals from chambers, see *ante*, pp. 143 *et seq.*

(b) As to fresh evidence on an appeal, see *ante*, p. 149. The ground here stated is not adapted for use in cases where the application for leave to file further evidence is likely to be opposed.

31. ORIGINATING SUMMONS BY TWO OUT OF THREE EXECUTORS AGAINST A THIRD, WHO WAS ALSO A LEGATEE, AND AGAINST OTHER BENEFICIARIES, FOR DETERMINING QUESTIONS OF CONSTRUCTION AND OF LAW ARISING UPON A WILL.

In the High Court of Justice, 1887, F., No.
Chancery Division.

Mr. Justice

In the matter of the estate of *J. V. T.*, deceased.

Between *J. W. C.* and *R. R. T.* Plaintiffs,
and

J. V. T. F., widow, and *J. W. F.* and

C. F. (respectively infants under the

age of twenty-one years), and *M. A. C.*

the wife of *J. C.*, *J. R.*, and *H. B.*

widow

... .. Defendants.

Let the defendant *J. V. T. F.*, one of the executors of the will of the above-named *J. V. T.*, and a legatee named in such will, and the defendants *J. W. F.*, *C. F.*, and *M. A. C.*, being respectively legatees under the said will, and the defendant *J. R.*, the heir-at-law of the said *J. V. T.*, and the defendant *H. B.*, one of the next of kin of the said *J. V. T.*, attend at the chambers of Mr. Justice , at the Royal Courts of Justice, at the time specified in the margin hereof, upon the application of *J. W. C.*, of , in the county of , merchant, and *R. R. T.*, of , in the county of , gentleman, two of the executors of the said will, that the following questions [of construction and of law] (*a*) arising upon the will of the said *J. V. T.* may be determined under the Rules of the Supreme Court, Order LV., r. 3, sub-sects. (*a*), (*e*), (*f*), and (*g*) (*b*); that is to say—

1. How the plaintiffs and defendant *J. V. T. F.*, as executors of the said testatrix, ought to deal with the forty shares in the Bank Limited, mentioned in the said will.

2. Whether the bequests contained in the said will of the said shares are valid in whole or in part.

3. Whether the defendant *J. W. F.* is entitled to the dividends on twenty of the said shares as from the death of the said testatrix until he attains the age of twenty-one years, or whether the said testatrix died intestate as to such dividends during that period, and who is now entitled to such dividends.

4. Whether the defendant *C. F.* is entitled to the dividends on ten of the said shares as from the death of the said testatrix, or whether there is an intestacy as to such dividends during the life of the defendant *J. V. T. F.*, and who is now entitled to such dividends.

5. Whether the gift by the said will of 25s. every four weeks to the defendant *M. A. C.* failed by reason of the failure of the gift

(*a*) As to the words here in [], see note (*a*) *ante*, p. 357.

(*b*) See note (*b*) to Form 20, *ante*, p. 357.

to the defendant *J. V. T. F.*, or how and by whom such 25s. ought to be paid.

6. Whether the defendant *J. W. F.* is entitled to the rents of the two freehold houses, Nos. _____, Terrace, _____, mentioned in the said will as from the death of the said testatrix, or whether there is an intestacy as to such rents until that defendant shall attain twenty-one, and who is now entitled to such rents.

7. Whether the said testatrix died intestate as to her real and residuary personal estate.

Dated, &c. [Conclude as in Form 23, p. 366.]

32. AFFIDAVIT FILED IN SUPPORT OF SUMMONS, FORM 31. (a)

[Title as in Summons.] (b)

I, *J. V. T. F.*, of _____, in the county of _____, widow, one of the above-named defendants, make oath and say as follows:—

1. My late aunt, the above-named *J. V. T.*, of _____, in the county of _____, widow, duly made her will, dated the _____ day of _____, 1886.

2. Such will, so far as material, and omitting formal parts, was in the words and figures following:—"I give to my nephew, *J. W. F.*, when he attains the age of twenty-one years, twenty shares in the _____ Bank Limited, and also my piano and two houses, 3 and 5, _____ Terrace. I also give to my niece, *J. V. T. F.*, twenty shares in the _____ Bank Limited; and at her decease ten of those shares are for her son *C. F.*, and five for her daughter *M. F.*, and five for her daughter *H. F.* My niece *J. V. T. F.* is to receive the interest of the forty shares, and rent of two houses up till *J. W. F.* attains the age of twenty-one. And she is to pay her mother, *M. A. C.*, 18, _____ Street, _____, twenty-five shillings every four weeks as long as she lives." And after bequeathing divers pecuniary legacies, including a legacy to the plaintiff *J. W. C.*, the said will proceeded as follows: "And furthermore I say that should *J. V. T. F.* cohabit with or marry *G. C.*, the said *J. V. T. F.* shall forfeit the whole of that which I have left, and that it shall be divided equally amongst her children mentioned by her so doing." And, after bequeathing divers specific legacies, the said will proceeds as follows: "I wish *J. W. C.*, and *R. R. T.*, and *G. V. T. F.* to be my executors to this my will. I also give to my niece *J. V. T. F.* all my furniture and effects."

3. The said will was attested by *J. W. F.* and the said *J. W. C.*, and me, this deponent, in the order named.

4. The said testatrix died on the _____ day of _____, 1886, and on the _____ day of _____, 1887, her said will was proved by the said *J. W. C.*, *R. R. T.*, and me, this deponent, in the principal registry.

5. I am a daughter of *M. A. C.*, who was a sister of the said testatrix, and sometime prior to her decease the said testatrix and her husband when living adopted me as their child.

6. On the _____ day of _____, 1877, I intermarried with

(a) As to evidence generally, see *ante*, pp. 27-48 and 92.

(b) See note (b), *ante*, p. 361.

the said *A. B.*, attend at the chambers of Mr. Justice , at the Royal Courts of Justice, Strand, London, at the time specified in the margin hereof, upon the application of *C. D.*, of , in the county of , the other executor of the said *A. B.*, that the following questions of administration arising with reference to the estate of the said *A. B.* may be determined under the Rules of the Supreme Court, Order LV., rr. 3 and 4, and the following relief be given, namely:

1. Whether the defendant *E. B.* is, under or by virtue of a certain agreement, dated the day of , 1879, or otherwise, a creditor of the estate of the said *A. B.*, deceased, to any and what amount. (*a*)

2. That if necessary an account may be taken of what (if anything) is due to the said *E. B.* from the estate of the said *A. B.*, under or by virtue of the said agreement or otherwise.

3. Or that the executors of the said *A. B.* may be at liberty to distribute his assets among the parties entitled thereto without reference to the claim of the said *E. B.*

4. That (if and so far as may be necessary) the personal estate of the said *A. B.* may be administered.

Dated, &c.

[*Conclude as in Form 23, p. 366.*]

34. AFFIDAVITS FILED ON HEARING OF SUMMONS, FORM 33. (*b*)

[*Title as in Summons.*]

I, *C. D.*, of , in the county of , make oath and say as follows:—

1. I am the above-named plaintiff.

2. *A. B.*, of , in the county of , by his will dated the day of , 1885, after revoking all previous wills theretofore at any time made by him, left to his wife *G.* everything that she could, by the help of her advisers for the time being, say *C. D.* (me this deponent) get hold of, and he appointed her the said *G.* his wife and me this deponent executrix and executor jointly to act in all matters connected with what estate he the testator had or was entitled to as they might think best, and after bequeathing a legacy of nineteen guineas to me this deponent, the testator, besides the statutory power given by law to trustees and executors, left me this deponent full discretion, with the consent of his said wife, to settle up all matters connected at all with his affairs.

3. The said testator died on the day of , 1885, at aforesaid, and his said will was, on the day of , 1885, proved in the principal registry of the Probate Division of Her Majesty's High Court of Justice by the oaths of the said *G. B.* and myself.

4. The assets of the said testator at the date of his death, so far

(*a*) As to advertisements for creditors, see p. 111 and *Re Bracken* (60 L. T. Rep. N. S. 623; W. N. 1889, p. 69).

(*b*) As to evidence generally, see *ante*, pp. 27-48 and 92.

as I have been able to ascertain the same, consisted of the following, *videlicet*.

[*Here insert short particulars of assets.*]

5. For some considerable time previous to his death I was aware that the said testator had experienced great trouble and annoyance from the behaviour of his father *E. B.*, of _____, in the county of _____, and although I was never aware of the details of the disagreement between them, I knew generally from information given to me by the said testator, that he had agreed to pay his father a certain sum on condition that his said father did not molest him in any way. The testator also informed me that there was an agreement to that effect, which had been continually broken by his father, who, however, being in want and having certain claims upon him by persons not connected by marriage or relationship with the testator, caused the latter great annoyance by continually applying for money, and by making certain statements with reference to him and his practice.

6. Upon searching through the testator's papers after his death, I found amongst them the paper writing now produced, and shown to me and marked C. D. 1.

7. The copy correspondence now produced and shown to me and marked C. D. 2, has, since the testator's death, taken place between the said *E. B.* and myself upon the subject-matter of his claim against the said estate. The copies therein set out are true copies of the originals of such letters. I have made diligent and full inquiries at _____, with reference to the circumstances connected with the payment of moneys under the said agreement, and from the information I have gathered I have not the slightest doubt but that the said *E. B.* has habitually broken the condition of such bond, and he was at the time of the testator's death and still is, as I am informed and believe, living at _____, which as I am informed and believe is within the prescribed distance.

8. The realised assets of the said testator consist solely of

[*Here insert short particulars.*]

9. The said *E. B.* has notwithstanding such correspondence never produced to me evidence in support of his said claim, nor has he withdrawn such claim, and under the aforesaid circumstances the assistance of the court is sought to decide upon the merits of the said claim prior to the distribution of the assets amongst the creditors of the estate.

Filed, &c.

Sworn, &c.

Affidavit Filed on Behalf of the Defendant E. B.

[*Title as in Summons.*]

I, *E. B.*, of _____, in the county of _____, one of the above-named defendants, make oath and say as follows:—

1. I have read a copy of the affidavit of *C. D.*, the above-named plaintiff, filed in this action on the _____ day of _____, 1886.

2. *A. B.*, the above-named testator, was at the time of his death and his estate still is justly and truly indebted to me in the sum of _____ l. for arrears from the _____ day of _____, 1884, of

the monthly allowance provided to be paid to me (subject as herein-after mentioned) by the said testator under the agreement, dated the day of , 1879, now produced to me marked A. The further sum of *l.* is now due to me from the estate of the said testator for arrears of the said monthly allowance to the present time. The estate of the said testator is also liable to pay to me under the agreement, and I claim payment of the said monthly allowance (subject to the reduction hereinafter mentioned) so long as I shall live. The letter of the said testator which accompanied the said agreement is now produced to me, and marked B. By the said letter the said testator undertook to execute a bond embodying the same conditions as those contained in the said agreement, if called upon.

3. Prior to the year 1879, and to the date of the said agreement, I made advances at various times to my son, the said testator, such advances amounted to *l.* I also in the month of , 1879, handed to my said son a promissory note for *l.* in my favour from . My said son duly received the amount secured by the said promissory note. The letter now produced and shown to me and marked C., is the letter in which my said son acknowledged the receipt of the said promissory note.

4. In or about the month of , 1869, I lent to one a sum of *l.* on a promissory note. Subsequently the said got into difficulties, and eventually only paid a dividend of 1*s.* 10*d.* in the pound on the amount secured by the said promissory note. The said dividend amounted to *l.* The cheque for the latter amount was handed by this deponent to the said testator, *A. B.*, on account of the consideration mentioned in the said agreement. The letter of the said *A. B.* acknowledging the receipt of the said cheque is now produced to me, and marked D.

5. The said sum of *l.* and *l.*, so received by the said testator, make together the sum of *l.* The balance between the latter sum and the amount of the said consideration money (*l.*) mentioned in the said agreement was paid by me to the said testator in cash.

6. In or about the year 1883 I had great difficulty in obtaining payment of the sums due to me from the said testator under the said agreement, owing to the financial embarrassment of the said testator. Ultimately I consented to accept a reduced allowance of *l.* per month in lieu of the sums provided to be paid by the said agreement. The letter now produced to me, and marked E., sets out the new arrangement made by the said testator. I am willing to accept the said reduced amount of *l.* per month in lieu of the payments mentioned in the said agreement.

7. The said testator did not carry out the arrangement referred to in the last-mentioned letter, but allowed the said monthly payments to fall into arrear, and the above-mentioned sum of *l.* was, as above stated, due to me at the death of the said testator, and still remains due and owing to me.

8. It is not the fact, as stated in the said affidavit of the said *C. D.*, that the conditions of the said agreement have been broken by me, and the said testator never raised any such question. The said testator having failed to make certain of the said monthly payments,

I was compelled to make applications to him for such payments from time to time, and have been put to very serious inconvenience by the defaults of the said testator in paying the said monthly allowance.

9. I live at _____ aforesaid, and was living there at the date of the said agreement, and at the date of the death of the said testator, and he never raised any objection to my living there. The said letter, marked E., hereinbefore mentioned was addressed to me at _____, and contains no objection, but on the contrary remits monthly allowance therein referred to, and the testator afterwards continued to make remittances from time to time on account of the said allowance.

10. And I, speaking positively for myself, and to the best of my knowledge and belief as to other persons, lastly say, that I have not, nor hath nor have any other person or persons by my order, or for my use, received any satisfaction or security whatsoever for the said sums of _____ l., and _____ l., or any part thereof respectively, save and except the said agreement.

35. ORIGINATING SUMMONS BY THE TRUSTEES AND EXECUTORS AGAINST BENEFICIARIES FOR THE DETERMINATION OF CERTAIN QUESTIONS OF FACT AND OF CONSTRUCTION ARISING UNDER A WILL.(a)

1887, P., No.

In the High Court of Justice,
Chancery Division,
Mr. Justice _____.

In the matter of the Estate of *W. P.*, deceased.

Between *J. G.* and *J. C.* Plaintiffs,
and

W. G., *B. C.*, spinster; *C. J. D.* and *M. L. D.*
his wife; *E. K. S.* and *E. J. K. S.* his wife,
and *S. C.*, *K. B. C.* and *R. C.* respectively, infants under the age of twenty-one years, and
A. C. C., *A. R. J.*, and *J. T. F.* Defendants.

Let the defendant *W. G.*, the joint executor with the plaintiff *J. G.* of the will of the late *J. P.*, who was the widow of the above-named testator *W. P.* and a legatee under his will dated the 6th day of August, 1874, and the defendants *B. C.*, *C. J. D.* and *M. L. D.* his wife, *E. K. S.* and *E. J. K. S.* his wife, and *S. T. C.*, *K. B. C.*, and *R. C. C.* respectively, infants, all of whom are pecuniary and residuary legatees under the said will, and the defendants *A. C. C.*, *A. R. J.* and *J. T. F.*, mortgagees of the share of the said *J. C.*, attend at the chambers of Mr. Justice _____, at the Royal Courts of Justice, Strand, London, at the time specified in the margin hereof, upon the application of *J. G.*, of _____, in

(a) This form is useful as an example of a case (1) in which certain of the defendants were appointed to represent a class of next of kin who were difficult to ascertain, see Order XVI., r. 32, *ante*, p. 22, and (2) in which certain preliminary inquiries were directed to be made before determining the rights of the parties.

the county of _____, Esquire, and J. C., of _____, in the county of _____, Esquire, the surviving trustees and executors of the said will that the following questions [of fact, of construction, and of administration (a)] arising with reference to the estate of the said W. P., may be determined under the rules of the Supreme Court, Order LV., r. 3, sub-sects. (a) and (g). (b)

1. What real and personal estate the said testator was possessed of or entitled to at the date of his said will, and of his death respectively, distinguishing property in possession at the date of such will from other property, and whether any and what part of the property of or to which he was possessed or entitled at his death consisted of property of or to which he was possessed or entitled in possession at the date of his will, or of property purchased or acquired with the proceeds of such property.

2. Whether property purchased by the said testator with or out of property or the proceeds of property which belonged to him in possession at the date of his said will, fell within the description of and devolved under the said will in the same way as property to which he was entitled in possession at the date of such will.

3. Or whether the property which belonged to the said testator in possession at the date of his said will ceased to so belong on a change of investment thereof, and thereupon became property to which he was entitled in possession after the date of his said will.

4. Under which devise and bequest in the said will contained the said testator's reversionary interest under his marriage settlement dated the 3rd day of January, 1846, passed.

5. What portion of the said testator's assets belonged to him in possession at the date and execution of his said will.

6. What portions of the said testator's assets were included in or passed under the devise and bequest therein contained of real estate and chattels real, and residuary personal estate of or to which he was seized or entitled in possession, or which he had power to dispose of at the date and execution of his said will.

7. What portion of the said testator's assets was included in or passed under the devise and bequest therein contained of real and personal estate of or to which he might become seized or entitled in possession after the date and execution of his said will, or over which he might in the interval between the date and execution of his said will and his decease acquire any disposing power.

8. Out of what portion of the said testator's assets the legacies of 660*l.* and 1800*l.* by the said will respectively bequeathed ought to be paid.

9. Whether the grandchildren of the said testator's sister B. C. are entitled to participate in his estate in competition with their living parents.

10. Out of what fund the debts and funeral and testamentary expenses of the said testator and the costs of proving his will and the costs of this application ought to be paid.

(a) The words here in [] are optional when applicable.

(b) See note (b) to Form 20, *ante*, p. 357.

11. If necessary that an order may be made for the administration of the real and personal estate of the said *W. P.* with all necessary and proper directions and inquiries.

Dated this day of 1887.(a)

[Conclude as in Form 23, p. 366.]

**36. ORDER MADE UPON THE FIRST HEARING OF SUMMONS,
FORM 35.**

[*Title as in Summons.*]

[Omitting formal parts.]

It being difficult to ascertain who are the next of kin of the said testator.

Let the defendants, *A. C. C.*, *A. R. J.*, and *J. T. F.*, the executors of the late *R. C. C.*, one of the next of kin of the said testator, be appointed to represent such next of kin.

And let the following inquiries be made, that is to say,

1. An inquiry what real and personal estate (other than the testator's interest under his marriage settlement, dated the day of , 1845) the testator was seised, possessed of, or entitled to in possession, or had power to dispose of at the date of his will.

2. An inquiry what real and personal estate (other than as aforesaid) the testator became seised of or entitled to in possession after the date of his said will, or over which in the interval between the date of his said will and death he acquired any disposing power.

3. An inquiry of what the estate of the testator consisted at the time of his death.

4. An inquiry whether any and what part of the property (other than as aforesaid) of or to which the said testator was seised, possessed, or entitled in possession, or had power to dispose of at the date of his death, consisted of property of or to which he was seised, possessed, or entitled in possession, or had power to dispose of at the date of his said will, or of property purchased or acquired with the proceeds of such last-mentioned property, or of any property substituted therefor.

Adjourn further consideration of the summons into court.

(a) The statement of facts and evidence in this case were of too special a nature to be usefully inserted here.

37. ORIGINATING SUMMONS BY THE TRUSTEES AND EXECUTORS AGAINST BENEFICIARIES FOR THE DETERMINATION OF CERTAIN QUESTIONS OF CONSTRUCTION AND OF LAW ARISING UNDER A WILL.

1887, N., No.

In the High Court of Justice,
Chancery Division.

Mr. Justice

In the matter of the estate of *S. N.* (widow) deceased.

Between *G. W.*, *J. H.*, *J. G. F.*, and *M. J. T.*,
the wife of the Rev. *W. T.*, ... Plaintiffs,
and

T. G., *H. B.*, *S. E. H.*, the wife of
J. T. H., *J. B.*, and *M. N. G.*, ... Defendants.

Let the defendant *T. G.*, a residuary legatee under the will of the above-named *S. N.*, late of _____, in the county of _____, and of _____, in the county of _____, widow, and the defendant *H. B.*, the heir-at-law of the said *S. N.*, and the defendants *S. E. H.*, the wife of *J. T. H.*, and *J. B.*, two of the next of kin of the said *S. N.*, the said *J. T. H.*, as the husband of the said *S. E. H.*, and the defendant *M. N. G.*, the legal personal representative of the late *G. N. C.*, who was another of the next of kin of the said *S. N.*, attend at the chambers of Mr. Justice _____, at the Royal Courts of Justice, at the time specified in the margin hereof, upon the application of *G. W.*, of _____, in the county of _____, Esq., *J. H.*, of _____, in the county of _____, *J. G. F.*, of _____, in the county of _____, Esq., and *M. J. T.*, the wife of the Rev. *W. T.*, of _____, in the county of _____, the trustees and executors, and executrix of the said will, that the following questions [of construction and of law (a)] arising upon the will of the said *S. N.* may be determined under the rules of the Supreme Court, Order LV., r. 3, sub-sect. (g) (b), that is to say,

1. Whether the share of the residuary estate of the said testatrix *S. N.* bequeathed by her will to her brother *J. G.* lapsed by reason of his death in the lifetime of the said testatrix, or whether such share survived for the benefit of the brothers and sisters of the said *J. G.*, in the said will named, or how otherwise.

2. If such share lapsed, whether the same devolved, so far as it was constituted by real estate or the proceeds of the sale thereof, upon the heir-at-law of the said testatrix, and so far as it was constituted by personal estate upon her next of kin, according to the Statute of Distributions, or how otherwise.

3. Whether such next of kin take *per stirpes* or *per capita*.

4. Who are now entitled to the aforesaid share of residuary estate, and in what shares and proportions.

5. How the costs of and incidental to this application ought to be provided for.

Dated, &c.

[Conclude as in Form 23, ante, p. 366.]

(a) As to the words here in [], see note (a), ante, p. 357.

(b) See note (b) to Form 20, ante, p. 357.

38.—ORIGINATING SUMMONS BY A SURVIVING EXECUTOR AND TRUSTEE AGAINST BENEFICIARIES FOR THE DETERMINATION OF CERTAIN QUESTIONS OF CONSTRUCTION ARISING UNDER A WILL.

1886, S., No.

In the High Court of Justice,
Chancery Division.

Mr. Justice

In the matter of the estate of *M. S.*, deceased.

Between *W. W.*, Plaintiff,
and

John E., *Joseph E.*, *R. E.*, *P. E.*, and

W. G. the younger Defendants.

Let the defendants *John E.*, of , in the county of , farmer, and *Joseph E.*, of , in the county of , farmer, the executors of the will of the late *R. E.*, of , in the county of , gentleman, and claiming to be legatees under the will of the above-named *M. S.*, and the defendants, *R. E.*, of , in the county of , farmer, and *P. E.*, of , in the county of , farmer, two of the next of kin according to the Statutes of Distributions, of the said *R. E.*, at the time of his death and at the time of the death of the said *M. S.* respectively, and also claiming to be legatees under the will of the said *M. S.*, and the defendant *W. G.* the younger, of , of the county of , farmer, one of the next of kin, according to the Statutes of Distributions, of the said *R. E.*, at the time of the decease of the said *M. S.*, attend at the chambers of Mr. Justice , at the Royal Courts of Justice, Strand, London, at the time specified in the margin hereof, upon the application of *W. W.*, of , in the parish of , in the county of , farmer, the surviving executor and trustee of the will of the above-named testatrix *M. S.*, that the following questions of construction, arising upon the will of the said *M. S.*, deceased, may be determined under the Rules of the Supreme Court, Order LV., rule 3, sub-sects. (a) and (g) (a); that is to say:

1. Whether under the will of the said testatrix *M. S.*, the defendants *John E.* and *Joseph E.*, the executors of the will of the said *R. E.*, are entitled, as part of the personal estate of the said *R. E.* to be administered by them under his will, to the legacy of 400*l.*, and to the residue of her estate bequeathed by the will of the said testatrix, or to either of them; or

2. Whether the persons who were the next of kin, according to the Statutes of Distributions, of the said *R. E.* at the time of the death of the said testatrix *M. S.*, are entitled to the said legacy of 400*l.* and to the said residue, or to either of them, and in the shares to which they would have been entitled under the said statutes or how otherwise; or

3. Whether the persons who were the next of kin, according to the Statutes of Distributions, of the said *R. E.* at the time of his death, are entitled to the said legacy of 400*l.* and to the residue, or to

(a) See note (b) to Form 20, ante, p. 357.

either of them, and in the share to which they would have been entitled under the said statutes, or how otherwise; or

4. Who in the events which have happened are now entitled to the said legacy and residue respectively, and in what shares.

Dated, &c.

[*Conclude as in Form 20, p. 358.*]

39. ORIGINATING SUMMONS BY ONE TRUSTEE AND EXECUTOR AGAINST ANOTHER WHO WAS ALSO A BENEFICIARY, AND OTHER BENEFICIARIES, FOR THE DETERMINATION OF CERTAIN QUESTIONS OF CONSTRUCTION, FACT, AND LAW, ARISING WITH REFERENCE TO THE ESTATES OF THREE DECEASED PERSONS.

In the High Court of Justice,
Chancery Division.

1888, No.

Mr. Justice

In the matter of the estate of *J. H.*, deceased,
and In the matter of the estate of *M. A. H.*, spinster, deceased,
and In the matter of the estate of *A. P. H.*, deceased.

Between *F. T.*, Plaintiff,
and

The president, vice-presidents, treasurers
and governors of the *M.* hospital, *J. C.*,
S. S. L., and *J. J.*, the trustees and
directors of the *S.* infirmary, *O. W.*,
G. B. L., *T. J.*, *J. B.*, *E. L. W.* (spin-
ster), and *C. A.* Defendants.

Let the defendants the president, vice-presidents, treasurers, and governors of the *M.* hospital, who claim to be legatees under the wills of the above-named *J. H.* and *A. P. H.* respectively, and the defendants, *J. C.*, *S. S. L.*, and *J. J.*, the trustees of the *B.* general hospital, legatees, or claiming to be legatees under the same wills respectively, and the defendant the said *S. L.*, the treasurer of the said *B.* general hospital, and the defendants the trustees and directors of the *S.* infirmary, legatees, or claiming to be legatees under the same wills respectively, and the defendant *O. W.*, the treasurer, and the defendant *G. B. L.*, the deputy-treasurer of the said *S.* infirmary, and the defendant *T. J.*, one of the trustees and executors of the will of the above-named *A. P. H.*, and also a devisee and legatee under such will, and defendants *J. B.* and *E. L. W.* respectively, pecuniary and specific legatees and annuitants under the will and codicils of the said *A. P. H.*, and *C. A.*, the first cousin and sole next of kin of the said *A. P. H.*, attend at the chambers of Mr. Justice at the Royal Courts of Justice, Strand, London, at the time specified in the margin hereof upon the application of *F. T.*, of , in the county of , gentleman, one of the trustees and executors of the will of the said *A. P. H.* that the following questions [of construction, of law, and of fact (a)] arising in the administration of the estates of the said

(a) The words here in [] are optional when applicable.

J. H., *M. A. H.*, and *A. P. H.* respectively, deceased, may be determined under the Rules of the Supreme Court, Order LV., r. 3, subsects. (a) and (g), and the following relief be given; that is to say:—

1. Whether the above-named *M. A. H.* and *A. P. H.* became absolutely entitled under the will of the above-named *J. H.* to all his property as joint tenants or otherwise, or what estate and interest they acquired under such will in such property.

2. Whether in the event which happened of the said *J. H.* dying without lawful issue, the *M.* hospital, the *B.* General Hospital, and the *S.* Infirmary, or any of those institutions, or the defendants, the president, vice-presidents, treasurers, and governors of the *M.* hospital, *J. C.*, *S. S. L.*, *J. J.*, the trustees and directors of the *S.* Infirmary, and the *Rev. J. D. S.*, or any of them as representing those institutions, became, under the will of the said *J. H.* entitled to his property, or any part thereof, and if so, for what estates or interests.

3. Whether under the will of the said *A. P. H.* the said hospitals and infirmary, or any of them, or the defendants representing the same respectively, are entitled to be paid the legacies bequeathed to them by the will of the said *J. H.* out of any and what part of the assets of the said *A. P. H.*, and whether or not in priority of all or any other legacies and payments under the will of the said *A. P. H.*

4. Or what effect the will of the said *A. P. H.* had upon the bequests contained in the will of the said *J. H.* in favour of the said hospitals and infirmary.

5. Out of what property of the said *A. P. H.* the pecuniary legacies (other than charitable legacies), and annuities bequeathed by his will and codicils, ought to be paid and provided for, and in particular whether the same, or any part thereof, are a charge upon his freehold property at _____, in the county of _____.

6. Whether such legacies and annuities ought to abate proportionately, or how otherwise.

7. What portions of the assets of the said *A. P. H.* were pure personal estate.

8. Whether the said *A. P. H.* died intestate as to his residuary impure personal estate.

9. Whether the sum of _____ *l.*, Four per Cent. _____ Stock of the Midland Railway, belonging to the testator *A. P. H.* passed to the defendant *J. B.* under the fourth codicil, dated the _____ day of _____, 1885, to the will of the said *A. P. H.*

10. Whether any and which of the pecuniary legacies and annuities and specific legacies bequeathed by the said will and codicils of the said *A. P. H.* were to be free from legacy duty.

11. Whether the second codicil, dated the _____ day of _____, 1884, to the said will of *A. P. H.*, revoked the annuities bequeathed by the same will, and the first codicil thereto.

12. Whether the specific bequests contained in the fourth codicil to the will of the said *A. P. H.* in favour of the defendants *E. L. W.* and *J. B.*, were in addition to or in substitution for the legacies and annuities bequeathed to them by the will and prior codicils.

13. If necessary an order for the administration of the real

and personal estate of the said *J. H.*, *M. A. H.*, and *A. P. H.* respectively.

14. How the costs of this application ought to be borne.

Dated, &c.

[*Conclude as in Form 23, p. 366.*]

40. ORIGINATING SUMMONS BY THE TRUSTEE OF A SETTLEMENT AGAINST THE CESTUIS QUE TRUST FOR THE DETERMINATION OF CERTAIN QUESTIONS OF CONSTRUCTION AND ADMINISTRATION ARISING UNDER THE TRUSTS OF A SETTLEMENT.

1886., C., No. .

In the High Court of Justice,

Chancery Division.

Mr. Justice .

In the matter of the trusts of an indenture of settlement, dated the day of , 1841, and made between *E. J. C.* (then and therein called *E. J. L.*, spinster) of the first part; the Rev. *J. G.* of the second part; and *C. B.* and *J. G. F.* of the third part.

Between *J. B.*, Plaintiff,
and

The Rev. *J. G. C.* and *E. J. C.*, his wife, Defendants.

Let the defendants *J. G. C.* and *E. J. C.*, the *cestui que trust* under the trusts of the above-mentioned indenture of settlement, attend at the chambers of Mr. Justice , at the Royal Courts of Justice at the time specified in the margin hereof upon the application of *J. B.* of , in Switzerland, the trustee of the said indenture of settlement, that the following questions [of construction and of administration (*a*)] arising under the trusts of the said indenture of settlement may be determined, and the following relief be granted under the Rules of the Supreme Court Order LV., r. 3.; that is to say:—

1. Whether under or by virtue of the said indenture of settlement, the defendant *E. J. C.* is or is not restrained from anticipating the dividends or income of the trust property.

2. That the true construction of the said indenture of settlement, and the rights of the parties interested thereunder may be ascertained and declared by the court.

3. Whether the plaintiff may transfer and pay the trust property to the defendants, or their assignee, without reference to the possible rights of children.

Dated, &c.

[*Conclude as in Form, p. 23, ante, p. 366.*]

(a) See note (*a*) *ante*, p. 357.

41. ORIGINATING SUMMONS BY THE TRUSTEE OF A SETTLEMENT AGAINST THE CESTUIS QUE TRUST FOR THE DETERMINATION OF A QUESTION OF CONSTRUCTION AND ADMINISTRATION ARISING UNDER THE SETTLEMENT.

1888, J., No.

In the High Court of Justice,
Chancery Division.

Mr. Justice

In the matter of the Trusts of an Indenture of Settlement dated the day of , 1873, and made between *P. E. S. J.* (then and therein described as *P. E. T.*, spinster), of the first part; *E. S. J.*, of the second part; and *P. B.* and *J. B. S.* of the third part.

Between *C. T.* Plaintiff,
and

E. J. and *P. E. J.*, his wife, and *E. P. J.*,
E. C. J., and *A. F. J.* (respectively
infants under the age of twenty-one
years), Defendants.

Let the defendants *E. J.* and *P. E. J.* his wife, and *E. P. J.*, *E. C. J.*, and *A. F. J.* (respectively infants under the age of twenty-one years), the *cestuis que trust* under the trusts of the above-mentioned indenture of settlement, attend at the chambers of Mr. Justice , at the Royal Courts of Justice, Strand, London, at the time specified in the margin hereof, on the application of *C. T.*, of in the county of Esq., the trustee of the said indenture of settlement, that the following questions [of construction and of administration (*a*)] arising under the trusts of the said indenture of settlement may be determined under the Rules of the Supreme Court, Order LV., r. 3, sub-sect. (*g*), and Order LV., r. 4, and if necessary the following relief be given, that is to say:—

1. Whether the plaintiff *C. T.* may lawfully and properly, under the power of advancement in the said indenture of settlement contained, with the consent in writing of the defendant *P. E. J.*, or otherwise, out of the corpus of the trust funds thereby brought into settlement by her, make her an annual allowance of 100*l.*, or any other sum, as from the day of 1887, during the minority of her three children or any two of them, by the defendant *E. J.*, viz., the defendants *E. P. J.*, *E. C. J.*, and *A. F. J.*, for or towards their education, or may otherwise raise and apply such sum for that purpose.

2. How the costs of this application ought to be provided for.

3. That (if necessary) the trusts of the said indenture of settlement may be administered by the court with all proper directions.

Dated, &c.

[Conclude as in Form 23, p. 366.]

(a) See note (*a*), ante, p. 357.

42. ORIGINATING SUMMONS BY A RESIDUARY LEGATEE FOR LIFE AND CESTUI QUE TRUST AND HER HUSBAND AGAINST THE SURVIVING TRUSTEE AND EXECUTOR OF A WILL FOR ACCOUNTS AND INQUIRIES AND PAYMENT. (a)

1887, W., No.

In the High Court of Justice,
Chancery Division.

Mr. Justice

In the matter of the estate of *A. W.* (a widow), deceased.
Between The Rev. *C. F. C. P.* and *C. P.* his wife, Plaintiff,
and

T. S. Defendant.

Let the defendant *T. S.*, the surviving trustee and executor of the will and codicils, dated respectively the , 1842, the , 1847, and the , 1851, of the above-named *A. W.*, late of in the county of , widow, attend at the chambers of Mr. Justice , at the Royal Courts of Justice, Strand, London, at the time specified in the margin hereof, upon the application of *C. F. C. P.* of in the county of , and *C. P.* his wife, who claim to be interested in the relief sought in right of the said *C. P.* as residuary legatee for life and *cestui que trust* under the said will, for an order under the Rules of the Supreme Court, Order LV., r. 3, sub-sects. (a), (c), (e), and (g), and Order LV., r. 4:

That the following inquiries and accounts and relief may be made, taken, and granted:—

1. An inquiry of what particulars the residuary personal estate of the said testatrix, *A. W.*, consisted at the time of her death, and of what the same now consists.

2. An account of the residuary personal estate of the said testatrix, *A. W.*, received by the defendant, *T. S.*, the surviving executor of her will, or by any other person or persons, by the order or for the use of the said defendant, or which without the wilful neglect or default of the defendant might have been so received.

3. An account of what is due from the defendant as such trustee and executor as aforesaid to the plaintiffs in right of the plaintiff, *C. P.*, as tenant for life of the residuary personal estate of the said testatrix.

4. Payment by the defendant to the plaintiff, *C. P.*, on her separate receipt of what shall appear to be due to the plaintiffs on taking the last-mentioned account.

5. Payment by the defendant to the plaintiff, *C. P.*, on her separate receipt during her life of all future income to arise from the residuary personal estate of the said testatrix.

Or, For an order for the administration of the personal estate of the said *A. W.*, with all necessary and proper directions.

Dated, &c.

[Conclude as in Form 23, p. 366.]

FORMS OF ORIGINATING SUMMONS AND OTHER
PROCEEDINGS UNDER ORDER LV., R. 5a, FOR
FORECLOSURE, &c. (a)

**43. ORIGINATING SUMMONS BY EQUITABLE MORTGAGEE OF
LEASEHOLDS BY MEMORANDUM AND DEPOSIT OF DEEDS.**

1888, — No.

In the High Court of Justice,
Chancery Division.

Mr. Justice

Between *R. A.* ... Plaintiff,

and

J. T. S. ... Defendant.

Let the defendant *J. T. S.* of _____, in the county of _____, the mortgagor, attend at the chambers of Mr. Justice _____, at the Royal Courts of Justice at the time specified in the margin hereof, upon the application of *R. A.* of _____, gentleman, the mortgagee (under R. S. C. O. 55, r. 5 (a)) that an account may be taken of what is due to the plaintiff for principal, interest, and costs upon an equitable mortgage, dated the _____ day of _____ 1885, and made between the defendant *J. T. S.* on the one part, and the plaintiff, *R. A.* of the other part, and effected thereby and by a deposit of an agreement for lease, dated the _____ day of _____, 1883, therein mentioned or referred to, and by the subsequent deposit of a lease dated the _____ day of _____, 1886, granted in pursuance of such agreement of part of the property therein comprised, and that such mortgage may be enforced by sale (b) or foreclosure, and (if necessary) that the defendant, *J. T. S.* may execute a proper conveyance or assignment of the mortgaged property to the plaintiff, (c) and that the defendant, *J. T. S.*, may be ordered to deliver up possession of the mortgaged property to the plaintiff.

Dated the _____ day _____ of _____, 1888.

[*Conclude as in Form 23, p. 366.*]

(a) See *ante*, p. 89 *et seq.*

(b) The right of an equitable mortgagee by deposit with or without a written memorandum is foreclosure (*Backhouse v. Charlton*, 8 Ch. Div. 444; 26 W. R. 504); but under certain circumstances he is entitled to a sale, see *Coote on Mortgages*, vol. I., p. 352, 5th edit., *Oldham v. Stringer* (51 L. T. Rep. N. S. 895; 33 W. R. 251; W. N. 1884, p. 235); and see *Conveyancing Act*, 1881 (4 & 45 Vict. c. 41), s. 25. As to the possibility of obtaining an immediate order for sale, see *Wade v. Wilson* (22 Ch. Div. 235; 47 L. T. Rep. N. S. 696; 52 L. J. 399, Ch.; 31 W. R. 237) and *Green v. Biggs* (52 L. T. Rep. N. S. 680; W. N., 1885, p. 128).

(c) Order LV., r. 5a, is silent on this point, but as it expressly mentions equitable mortgage, it is conceived that the judge could upon this summons order a conveyance to be executed.

44. AFFIDAVITS FILED IN SUPPORT OF SUMMONS, FORM 43.[*Title as in Summons.*]

I, *R. A.*, of _____, gentleman, the above named plaintiff, make oath and say as follows :

1. By a memorandum of agreement made the _____ day of _____, 1885, between the defendant *J. T. S.* of the one part, and me this deponent of the other part, and duly signed by the defendant, it was agreed that in consideration of 12*l.* 1*s.* 8*d.*, to the said defendant paid by me on or before the signature of the said agreement, and in consideration of such further advances as were thereafter made, the document comprised in the schedule thereto (and which the said defendant had on the _____ day of _____ deposited with me), should thenceforth be held by me as an equitable security for the payment by the defendant *J. T. S.* to me on the _____ day of _____ then next of the sum of 12*l.* 1*s.* 8*d.*, together with interest thereon at the rate of 10*l.* per cent. per annum, to be computed from the date thereof, and also for the payment of such further sums as should at any time thereafter whilst the said document should continue in my possession, be advanced by me to the said defendant with interest thereon at the rate aforesaid. And the said defendant thereby charged all the hereditaments and property comprised in the said document to which the same related, with the payment to me of the said sum of 12*l.* 1*s.* 8*d.* and also all such further advances as aforesaid and interest. And also agreed at anytime upon my request to execute to me a legal mortgage of the said hereditaments and premises as therein mentioned. And in the said memorandum of agreement it was also agreed that I should have all the powers conferred on mortgagees by sects. 19 to 24, inclusive, of the Conveyancing and Law of Property Act, 1881, in like manner as if the said memorandum of agreement had been a mortgage by deed, and that the said defendant and all persons deriving title under him should upon any sale made under the said statutory power execute and do such assurances and things for vesting in the purchaser the legal estate of the property sold as should be required in that behalf by the person or persons by whom the sale should have been made.

2. The document now produced and shown to me and marked *R. A. 1* is the said memorandum of agreement.

3. The document comprised in the schedule to the said memorandum of agreement consisted of an agreement for a lease dated the _____ day of _____, 1883, and made between *E. D.* spinster, and *F. F.* (trustees of the will of the late *G. D.*) of the one part and the defendant *J. T. S.* of the other part, being an agreement for a lease to the defendant of two plots of land situate at _____ in the county of _____ for building purposes.

4. The document now produced and shown to me and marked *R. A. 2*, is the said agreement for a lease so deposited with me as aforesaid.

5. Subsequently to the date of the said agreement of the _____ day of _____, 1885, I lent and advanced to the defendant on the

security of such agreement and of the said deposit the following further sums on the following dates respectively.

[*Here insert dates and amounts of advances*]

amounting in the aggregate, together with the said sum of 12*l.* 1*s.* 8*d.* to 532*l.* 19*s.* 11*d.*

6. Subsequently to the date of the said agreement of the day of _____, 1885, the defendant erected, or caused to be erected, on one of the said plots of land a messuage or dwelling-house, known as "_____" and on the _____ day of _____, 1886, in pursuance of the said agreement of the _____ day of _____, 1883, a lease of the same plot of land with the messuage thereon was granted by the said *E. D.* and one *W. O.* (who had been appointed trustee of the said will in place of the said *F. F.*, then deceased), unto the defendant for the term of ninety-nine years, from the _____ day of _____, 1883, at the yearly rent (after the first year of the said term) of 8*l.* 8*s.*

7. On the _____ day of _____, 1886, the lease was deposited with me by the said defendant as part of my said equitable security.

8. The document now produced and shown to me, and marked R. A. 3, is the said indenture of lease so deposited with me as aforesaid.

9. There is due to me upon and by virtue of my said mortgage security, dated the _____ day of _____, 1885, and of the said deposits of agreement for a lease and lease respectively, the sum of 532*l.* 19*s.* 11*d.* for principal, and the sum of 113*l.* 8*s.* 10*d.* for interest, computed at the rate of 10 per cent. per annum from the respective times when the said several sums were advanced by me as aforesaid up to the day of the date hereof, making together the sum of 646*l.* 8*s.* 9*d.*

10. I have not, nor hath or have any other person or persons by my order, or for my use, to my knowledge or belief received the said sum of 646*l.* 8*s.* 9*d.*, or any part thereof, nor any security or satisfaction for the same, or any part thereof, save and except the said mortgage securities.

Sworn, &c.

Filed, &c.

[*Title as in summons.*]

I, *C. J. C.*, of _____, in the county of _____, clerk to Messrs. _____, of _____ aforesaid, make oath and say as follows:

1. I saw the defendant *J. T. S.*, one of the parties to a memorandum of agreement made and entered into the _____ day of _____, 1885, now produced and shown to me and marked R. A. 1, duly sign the said memorandum of agreement.

2. The signature "*J. T. S.*," set and subscribed to the said memorandum of agreement as one of the parties executing the same, is of the proper handwriting of the said *J. T. S.*

3. The signature "*C. J. C.*," set and subscribed to the foot of the said agreement as a witness, is of my proper handwriting.

Sworn, &c.

Filed, &c.

45. ORIGINATING SUMMONS BY AN EQUITABLE MORTGAGEE OF LEASEHOLDS BY MEMORANDUM AND DEPOSIT OF DEEDS.

1888, S., No.

In the High Court of Justice.

Chancery Division.

Mr. Justice

Between *J. M. S.*, Plaintiff.

and

J. T. S. and *J. W. S.*, Defendants.

Let the defendant *J. T. S.*, the mortgagor, and the defendant *J. W. S.*, the second mortgagee, attend at the chambers of Mr. Justice , at the Royal Courts of Justice, Strand, London, at the time specified in the margin hereof upon the application of *J. M. S.*, of , in the county of , gentleman, the first mortgagee (under R. S. C., Order LV., r. 5 a), that an account may be taken of what is due to the plaintiff for principal and interest and costs upon an equitable mortgage, dated the day of , 1885, and made between the defendant *J. T. S.* of the one part, and the plaintiff *J. M. S.* of the other part, and effected thereby and by a deposit of a lease, dated the day of , 1885, therein mentioned or referred to, and that such mortgage may be enforced by sale or foreclosure; and (if necessary) that the defendant *J. T. S.* may execute a proper conveyance or assignment of the mortgaged property to the plaintiff; and that the defendant *J. T. S.* may be ordered to deliver up possession of the mortgaged property to the plaintiff.

Dated this day of , 188 .

[*Conclude as in Form 23, p. 366.*]

46. ORIGINATING SUMMONS BY FIRST MORTGAGEES OF FREEHOLDS MORTGAGED BY DEMISE FOR A LONG TERM WHERE THE EQUITY OF REDEMPTION HAD BEEN SETTLED.

1887, A., No.

In the High Court of Justice.

Chancery Division.

Mr. Justice

Between *The A. Fire Office* Plaintiffs,

and

R. M., *M. T.*, *H. T.*, *R. M. L.*, *F. L.*, and

T. J. M. M., an infant, and *J. L.*,

A. S. M. and *F. P.* and *E. E.*, widow,

G. N. E. and *W. E. E.*, Defendants.

Let the defendant *R. M.*, the tenant for life under the will of the late *R. B. M.*, of in the county of , Esq., the defendants *M. T.* and *H. T.*, the second mortgagees of the life estate of the said *R. M.*, the defendants *R. M. L.* and *F. L.*, the trustees of the said will, the defendant *T. J. M. M.*, an infant, the first tenant in tail male in remainder under the said will, and the defendants *J. L.*, *A. S. M.*, and *F. P.*, the trustees of a term of 1000 years and

of a portion charge of 5000*l.* created under a power contained in the said will, and the defendant *E. E.*, *G. W. E.*, and *W. E. E.*, the executors and devisees of trust estates of the late *G. N. E.*, the surviving trustee of the marriage settlement of the defendant *R. M.*, and in whom a term of 1000 years is vested for securing portions charged under a power contained in the said will, attend at the chambers of Mr. Justice _____ at the Royal Courts of Justice, Strand, London, at the time specified in the margin hereof upon the application of the A. Fire office, whose office is at _____ in the county of _____, the first mortgagees (under *R. S. C.*, Order LV., r. 5*a*), that an account may be taken of what is due to the plaintiffs for principal, interest, and costs on a mortgage dated the _____ day of _____, 18____, and made between the said *R. B. M.* of the one part, *R. H.*, *R. B.*, and *G. P.* of the other part, and that the said mortgage may be enforced by foreclosure in the terms of the minutes annexed to this summons.

Dated this _____ day of _____, 1887.

[*Conclude as in Form 23, p. 366.*]

47. AFFIDAVIT FILED IN SUPPORT OF SUMMONS, FORM 46.

[*Title as in Summons.*] (*a*)

I, *H. J. S.*, of _____, secretary of the above-named plaintiffs, the A. Fire Office, make oath and say as follows:

1. I am and have been for twelve years last past the secretary of the said A. Fire Office, and in that capacity I am well acquainted with their affairs.

2. By an indenture of mortgage dated the _____ day of _____, 1845, and made between *R. B. M.*, of _____, of the one part, and *R. H.*, *R. B.*, and *G. P.* of the other part, in consideration of 9000*l.* to the said *R. B. M.* paid by the said *R. H.*, *R. B.*, and *G. P.*, the said *R. B. M.* granted and demised unto the said *R. H.*, *R. B.*, and *G. P.*, their executors, administrators, and assigns, divers messuages, farms, lands, and hereditaments situate in the parish of _____ in the county of _____ called respectively _____ and _____ containing together by admeasurement a. r. p. or thereabouts. The _____ containing by admeasurement a. r. p. or thereabouts. The _____ containing by admeasurement a. r. p. or thereabouts. The _____ containing by admeasurement a. r. p. or thereabouts, and also a message and tenement containing a. r. p. or thereabouts, to hold the same unto the said *R. H.*, *R. B.*, and *G. P.* their executors, administrators, and assigns, for the term of 1200 years, to be computed from the date of the indenture now being stated without impeachment of waste, subject nevertheless to a proviso for cesser of the said term on payment by the said *R. B. M.*

(*a*) Save and except that as there are several defendants it will be sufficient to state the name of the first defendant in full, and to refer to the rest as "and others," *ante*, p. 40.

his heirs, executors, or administrators unto the said *R. H.*, *R. B.*, and *G. P.*, their executors, administrators, or assigns of 9000*l.* on the day of then next with interest thereon in the meantime at the rate of 5*l.* per cent. per annum reducible as therein mentioned. And it was thereby declared and agreed that if the said *R. H.*, *R. B.*, and *G. P.* or any of them should happen to die whilst the said sum of 9000*l.* or the interest thereof or any part thereof, should continue upon that security, the receipt or receipts of the survivors or survivor of them or of their or his assigns should be a good and effectual release and discharge for the same or any part thereof.

3. The indenture marked *H. J. S. 1*, now produced and shown to me, is the said indenture of mortgage. (*a*)

4. By the *A. Fire Insurance Act*, 18 (being an Act for incorporating the *A. Fire Office* and for other purposes relating thereto, and by which Act a previously existing company or co-partnership called "The *A. Fire Office*" was dissolved), sect. 12, it was provided that, subject to the provision thereafter contained (which did not affect the said mortgage security) all lands and other property, real and personal, wherever situated, which, at the passing of that Act belonged to or were held by or vested in the dissolved company or the trustees the directors or the secretary thereof or otherwise for the use or behoof of the said dissolved company, whether held absolutely or in security should be and the same were thereby vested in the company, and should in future be held, conveyed, released, discharged, or otherwise disposed of by the company under the corporate name and designation "The *A. Fire Office*." And by sect. 14 of the said Act it was provided that it should be lawful for the company in all matters and proceedings whatsoever to use the said corporate name and designation of the *A. Fire Office*, and by and under that name the company might sue and be sued, and should have power to acquire, purchase, and hold absolutely or in security any lands and property of any description real or personal wherever situated in or upon which the moneys and funds of the company might be invested.

5. The document marked *H. J. S. 2*, now produced and shown to me, is a Queen's printer's copy of the said Act of Parliament.

6. On the , day of , 1886, notice to pay off the said mortgage debt of 9000*l.* and interest was given on behalf of the plaintiffs to the defendant *R. M.*, but such notice has not been complied with and the whole of the said sum of 9000*l.* together with 268*l.* 14*s.* 11*d.* for interest thereon up to the day of 1887 (less income tax) is still due and owing to the plaintiffs on the security of the said indenture of the day of 1845.

Sworn, &c.

Filed, &c.

(*a*) As this deed was upwards of thirty years old it did not require to be proved *strictly*.

48. ANOTHER AFFIDAVIT IN SUPPORT OF SUMMONS, FORM 46.[*Title as in Summons.*] (a)

I, *T. M. H.* of _____, in the county of _____, solicitor, make oath and say as follows :

1. My late father *W. W. H.* and I, then in partnership, were the family solicitors of the late *R. B. M.*, of _____, in the county of _____, and I was well acquainted with his affairs. I have also for many years past been the solicitor of the *A. Fire Office*.

2. The said *R. B. M.* duly made his will dated the _____ day of _____ 1843, and thereby gave and devised all his manors or reputed manors, messuages, lauds, tenements, and other hereditaments of and in _____, in the said county of _____, and all his advowsons and rights of patronage and presentation of and to the churches of _____ aforesaid, and all his messuages, lands, tenements, and other hereditaments situate, lying, and being in the several parishes of _____, in the same county; and all and every other the manors or reputed manors, messuages, lands, tenements, and hereditaments whatsoever and wheresoever of or to which he the said *R. B. M.*, or any person or persons, in trust for him (the said testator) was or were seized or entitled for any estate of freeholds and inheritance or of freehold only in possession, reversion, remainder, or expectancy with their rights, members, and appurtenances (save and except the advowson of the living thereafter mentioned, and also except the estates vested in him as trustee or mortgagee) to *J. W. L.*, of _____, and his heirs, to the uses upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, and declarations thereafter expressed, declared, and contained of and concerning the same (that was to say) to the use of his, the said testator's brother *T. F. M.*, and his assigns for and during the term of his natural life without impeachment of waste; and immediately after the determination of that estate by forfeiture or otherwise in the lifetime of the said *T. F. M.*, to the use of the said *J. W. L.* and his heirs during the natural life of the said *T. F. M.* upon trust to preserve the contingent remainders, and after the decease of the said *T. F. M.* to the use of the said testator's nephew, the defendant *R. M.* and his assigns during his life without impeachment of waste, with remainder to the use of the said *J. W. L.* and his heirs during the life of the said *R. M.* in trust for him, and to preserve contingent remainders; and after the decease of the said *R. M.* to the use of the first and every other son of his body lawfully issuing, severally, successively, and in remainder one after another, in order and course as they should respectively be in priority of birth, and the heirs male of the body and respective bodies of such son and sons, the elder of such sons, and the heirs male of his body issuing being always to take before, and to be preferred to the younger of such sons, and the heirs male of his and their body and respective bodies issuing, with divers remainders over; and the said will contained a power for the said testator's brother, and the other persons therein-

(a) See note (a), *ante*, p. 398.

before made tenants for life as and when they should become entitled to the actual possession and to the receipt of the rents and profits of the said manors and hereditaments by any deed or instrument in writing with or without power of revocation and new appointment to be by them sealed and delivered in the presence of and attested by two or more credible witnesses or by will, to charge all or any part of the said hereditaments thereby devised with the payment of any sum or sums of money not exceeding in the whole 5000*l.* for the portion or portions of any daughter or daughters, or younger son or sons of them the said testator's brothers, and the other persons aforesaid, the same to vest and be payable as the person exercising the power should in manner aforesaid direct, and power for the person exercising the power of charging the said hereditaments with such portions as aforesaid, to limit the said hereditaments to any person or persons for any term of years for the purpose of raising the same. And the said will contained a power of sale over the said hereditaments exercisable by the said *J. W. L.* and his executors or administrators with the consent of the adult tenant for life for the time being of the said hereditaments. And the said testator appointed the said *T. F. M.*, his nephew *R. M. W.*, and his cousin *R. H. G. M.*, executors of his said will.

3. The said testator died on the day of , 1852, and on the day of , 1853, his said will was proved in the Prerogative Court of Canterbury by all the said executors thereof.

4. The said *T. F. M.* was married once only, namely, on the day of , 1831, to *H. M. M.*, at the parish church of , in the county of .

5. The said *T. F. M.* and *H. M. M.* are the same persons as "*T. F. M.*, bachelor," and "*H. M. M.*, spinster," named in the certificate of marriage marked *T. H. M.*, now produced and shown to me.

6. The said *T. F. M.* had by his said wife two children only, namely, the defendant *R. M.* and *H. L. M.*

7. The defendant *R. M.* was baptised on the day of , 1836, at the parish church of , in the county of . He is the same person as "*R. M.*, son of *H. M.* and *T. F. M.*," named in the certificate of baptism marked *T. M. H. 2* now produced to me. He is still living.

8. The said *H. L. M.* was baptised on the , day of , 1834, at the parish church of aforesaid. She is the same person as "*H. L.*, daughter of *T. F.* and *H. M. M.*," named in the certificate of baptism marked *T. M. H. 3*, now produced and shown to me.

9. By an indenture dated the day of , 1861, and made between the said *T. F. M.* of the one part and the said *H. L. M.* of the other part, the said *T. F. M.* being then in the actual possession or in the receipt of the rents and profits of the hereditaments devised by the will of the said *R. B. M.*, in pursuance of the power to him given by the same will irrevocably appointed that all the said manors, messuages, lands, and hereditaments should be charged with payment to the said *H. L. M.* of the sum of 5000*l.* for her portion, the same to vest and be payable to her immediately after the execution thereof and by the same indenture,

the said *T. F. M.*, in further pursuance of the said power, limited and appointed all the said hereditaments to the said *H. L. M.*, her executors, administrators, and assigns, for the term of 1000 years for better securing the said sum of 5000*l.*

10. The signature "*T. F. M.*" set out and subscribed to the said indenture of the day of , 1861, as the party executing the same, is of the proper handwriting of the said *T. F. M.*, the said *T. F. M.* having signed, sealed, and as his act and deed delivered the same in the presence of me this deponent, and of *W. W.*, of , solicitor; the signature "*T. M. H.*," being one of the signatures set and subscribed to the attestation indorsed on the said indenture of the day of , 1861, of the execution thereof by the said *T. F. M.*, is of my proper handwriting.

11. By another indenture dated the day of , 1861, and made between *M. L.* of the first part and the said *T. F. M.* of the second part, the said *H. L. M.* of the third part, and the defendant *J. L.*, *J. L. J.* (since deceased), and the defendants *A. S. M.* and *F. P.* of the fourth part, the said *H. L. M.* assigned the said sum of 5000*l.* and the said term of 1000 years for securing the same, to the said *J. L.*, *J. L. J.*, *A. S. M.* and *F. P.* (being the trustees of the settlement executed on the marriage of the said *H. L. M.* with the said *M. L.*) upon certain trusts therein mentioned or referred to.

12. *R. B.*, late of , in the county of , Esq., died on the day of , 1860. He is the same person as "*R. B.*," named in the paper writing marked *T. M. H.* 4, now produced and shown to me and purporting to be a certified copy of an entry in a register of deaths given at the General Register Office.

13. *G. P.*, late of , in the county of , Esq., died on the day of , 1861, and was buried on the day of , 1861, at , in the county of . He is the same person as "*G. P.*," named in the certificate of burial marked *T. M. H.* 5 now produced and shown to me.

14. By an indenture dated the day of , 1862 (indorsed on a certain indenture of mortgage dated the day of , 1845, and made between the said *R. B. M.* of the one part and *R. H.*, the said *R. B.*, and *G. P.* of the other part), and made between the said *R. H.* of the one part, and the said *R. H.*, *J. P.*, and *R. L. B.* of the other part, the said *R. H.* assigned the principal sum of 9000*l.* secured by the said indenture of the day of , 1845, and the interest thereon and all securities for the same, unto the said *R. H.*, *J. P.*, and *R. L. B.*, their executors, administrators, and assigns. And by the same indenture the said *R. H.* assigned unto himself the said *R. H.* and the said *J. P.* and *R. L. B.* all the said messuage, farms, lands and hereditaments comprised in and demised by the said indenture of the day of , 1845, to hold the same unto the said *R. H.*, *J. P.*, and *R. L. B.*, their heirs, executors, administrators, and assigns, for all the then residue of the term of 1200 years, created by the said indenture of the day of , 1845, subject to the proviso for redemption or cesser in the last-mentioned indenture contained.

15. I saw the said *R. H.* sign, seal, and as his act deliver the said indenture, dated the day of , 1862, and marked *T. M. H. 6*, now produced and shown to me.

16. The signature "*R. H.*" set and subscribed to the said indenture dated the day of , 1862, as one of the parties executing the same, is of the proper handwriting of the said *R. H.*

17. The signature "*T. M. H.*" set and subscribed to the attestation subscribed to the said indenture of the day of , 1862, of the execution thereof by the said *R. H.*, is of my proper handwriting.

18. By a statutory declaration made before me this deponent by the said *R. H.*, *J. P.* and *R. L. B.*, of the day of , 1865, and by *E. T.* on the day of the same month, the said *R. H.*, *J. P.*, *R. L. B.*, and *E. T.* respectively declared that the said sum of 9000*l.* and interest secured by the said indentures of the day of , 1845, and the day of , 1862, and the securities for the same, were the property of the plaintiffs the *A. Fire Office*.

19. The signatures *R. H.*, *J. P.*, *R. L. B.*, and *E. T.* respectively set and subscribed to the said statutory declaration marked *T. M. H. 7*, now produced and shown to me, are of the proper handwriting of the said *R. H.*, *J. P.*, *R. L. B.*, and *E. T.* respectively.

20. The said *T. F. M.* died on the day of , 1869, and was buried at , in the county of . He is the same person as "*T. F. M.*" named in the certificate of burial, marked *T. M. H. 8*, now produced and shown to me.

21. The said *R. M.* has been married once only, namely, on the day of , 1871, to *E. F. C.*, at the district parish church of , in the county of .

22. The said *R. M.* and *E. F. C.* are the same persons as "*R. M.*, bachelor," and "*E. F. C.*, spinster," named in the paper writing marked *T. M. H. 9*, now produced and shown to me, and purporting to be a certified copy of an entry in a register of marriages given at the General Register Office.

23. The first child of such marriage, namely, the defendant *T. J. M. M.*, was born on the day of , 1872, and he is the same person as "*T. J. M.*, son of *R. M.* and *E. F. M.*, formerly *C.*," named in the paper writing marked *T. M. H. 10*, now produced and shown to me, and purporting to be a certified copy of an entry in a register of births given at the General Register Office.

24. On or about the day of , 1866, I received from the defendants *M. T.* and *H. T.* the notice or document marked *T. M. H. 11*, now produced and shown to me.

Sworn, &c.

Filed, &c.

49. ANOTHER AFFIDAVIT IN SUPPORT OF SUMMONS, FORM 46.[*Title as in Summons.*] (a)

I, A. L. J., of _____ in the county of _____, make oath and say as follows:—

1. I know and was well acquainted with J. L. J., formerly of _____, in the county of _____, and late of _____, in the county of _____, and one of the trustees of a certain indenture dated the _____ day of _____, 1861, and made between H. L. M. of the one part and the said J. L., J. L. J., A. S. M., and F. P. of the other part, and also one of the trustees of the settlement made upon the marriage of H. L. M. with M. L.

2. The said J. L. J. died in the month of _____, 1871, and was buried on the _____ day of _____, 1871, at _____, in the county of _____. He is the same person as "J. L. J.," named in the certificate of burial marked A. B. 1, now produced and shown to me.

50. ANOTHER AFFIDAVIT IN SUPPORT OF SUMMONS, FORM 46.[*Title as in Summons.*] (a)

I, R. M. L., of _____, one of the above-named defendants, make oath and say as follows:—

1. I knew and was well acquainted with the late J. W. L., of _____, who I am informed was the surviving trustee of the will of the late R. B. M.

2. The said J. W. L. was my brother.

3. By his will, dated the _____ day of _____, 1868, the said J. W. L. devised all estates vested in him as a trustee or mortgagee to me and the defendant F. L., and appointed me and the said F. L. executors of his said will.

4. The said J. W. L. died on the _____ day of _____, 1876, and I was present at his funeral.

5. The said will was proved by me and the said F. L. on the day of _____, 1876, in the Principal Registry of the Probate Division of the High Court of Justice.

51. MINUTES OF ORDER REFERRED TO IN SUMMONS, FORM 46.

In the High Court of Justice,
Chancery Division.

The A. Fire Office v. M. and others.

Proposed minutes of judgment referred to in annexed summons.

Let an account be taken of what is due to the plaintiffs *under and by virtue of their mortgage security* (b), dated the _____ day of _____, 1845, in the summons mentioned and for their costs of this action to be taxed by the taxing master; and let, upon the defendants R. M., M. T., H. T., R. M. L., and F. L., T. J. M. M.,

(a) See note (b), *ante*, p. 361.

(b) The words in italics are sufficient to cover everything due to the mortgagee including costs of repairs and insurance, and his costs outside the action.

J. L., A. S. M., F. P., E. E., G. N. E., and W. E. E., or any of them, paying to the plaintiffs what shall be certified to be due to them under and by virtue of their said security within six calendar months (*a*) from the date of the chief clerk's certificate at such time and place as shall be thereby appointed, the plaintiffs assign, surrender, or otherwise assure the mortgage premises during the residue of the term of 1200 years created by the said indenture, free and clear of and from all incumbrances done by the plaintiffs or any persons claiming by, from, or under them, or by those under whom they claim, and deliver up upon oath all deeds and writings in their custody or power relating to the said premises to the said defendants, or to such one or more of them as shall so redeem the plaintiffs, or as he or they shall direct, such assurance to be settled by the judge in case the parties differ about the same.

And it is ordered that, in case the said defendants, or any or either of them, shall so redeem the plaintiffs, the defendant or defendants so redeeming the plaintiffs are or is to be at liberty to apply to this court, as he or they shall be advised, for the addition to the order of any further accounts and directions consequential thereon, which by reason of such redemption the court may think just, or otherwise as he or they shall be advised, and on such application it is not to be incumbent on the defendant or defendants so applying to give to the plaintiffs notice thereof; but this order is to be without prejudice to any question which may arise as to the rights or interests of the said defendants as between themselves to or in the said hereditaments and premises. (*b*) But in default of the said defendants, or any or either of them, so redeeming the plaintiffs by the time aforesaid, let the defendants from thenceforth stand absolutely debarred and foreclosed of and from all right, title, interest, and equity of redemption in and to the hereditaments and premises comprised in the plaintiffs' said mortgage security during the residue of the term created by the said indenture of the day of _____, 1845.

Liberty to apply.

52. ORIGINATING SUMMONS BY FIRST MORTGAGEE IN POSSESSION OF FREEHOLDS AGAINST THE MORTGAGOR AND THE PURCHASER OF THE EQUITY OF REDEMPTION OF PART OF THE PROPERTY, THE PLAINTIFF SEEKING TO CONSOLIDATE.

In the High Court of Justice, 1886, N., No.
Chancery Division.

Mr. Justice

Between *G. N. and W. N.* Plaintiffs,
and

W. H. G. and the X. Company Limited, Defendants.

Let the defendants *W. H. G. and the X. Company Limited*, the

(*a*) As to fixing one period of redemption, see *Platt v. Mendel* (51 L. T. Rep. N. S. 424; 27 Ch. Div. 246; 54 L. J. 1145, Ch.; 32 W. R. 918); *Tufnell v. Nichols* (56 L. T. Rep. N. S. 152; W. N. 1887, p. 52.)

(*b*) See *Bartlett v. Rees* (12 Eq. 397; 25 L. T. Rep. N. S. 373; 40 L. J. 599, Ch.; 19 W. R. 1046) and *Jennings v. Jordan* (6 App. Cas. 698, 721; 45 L. T. Rep. N. S. 593; 51 L. J. 129, Ch.; 30 W. R. 369).

person and company respectively interested in the equity of redemption of the messuages and hereditaments comprised in the respective mortgages hereinafter mentioned, attend at the chambers of Mr. Justice _____, at the Royal Courts of Justice, Strand, London, at the time specified in the margin hereof, upon the application of *G. N.*, of _____, in the county of _____, and *W. N.*, of _____, in the county of _____, Esquire, who claim to be interested in the relief sought as mortgagees for an order (under the Rules of the Supreme Court, Order LV., r. 5a) for foreclosure in the terms of the minutes annexed to this summons. (a)

Dated, &c.

[*Conclude as in Form 23, p. 366.*]

53. ORDER MADE ON SUMMONS, FORM 52.

[*Title as in Summons.*]

Upon the application (on an Originating Summons) of the plaintiffs, under Order LV., rule 5a, of the Rules of the Supreme Court, who claim to be interested as mortgagees, and upon hearing the solicitors for the applicants and for the defendants, and upon reading an affidavit of *A. B.*, filed the _____, 1887, and the several exhibits therein referred to, marked *A. B. 1.*, *A. B. 2.*, *A. B. 3.*, *A. B. 4.*, and *A. B. 5* (*A. B. 1.*, *A. B. 2.*, *A. B. 3.*, and *A. B. 4* being four indentures of mortgage, all dated the _____, 1878, between *W. H. G.* of the one part, and *G. N. C. D.* (now deceased) and *W. N.* of the other part, and *A. B. 5* being a certificate of the death of the said *C. D.*)

It is ordered that the following accounts be taken:—

1. An account of what is due to the plaintiffs under and by virtue of the said four indentures of mortgage dated the _____, 1878, and for their costs of this action, such costs to be taxed by the taxing master.

2. An account of the rents and profits received, or which but for wilful default might have been received, by the plaintiffs. (b)

And it is ordered that what shall appear to be due on account 2, be deducted from what shall appear to be due on account 1, and the balance certified, and upon the defendants, or either of them, paying to the plaintiffs what shall be certified to be the balance due to them within six calendar months after the date of the chief clerk's certificate, at such time and place as shall be thereby appointed, it is ordered that the plaintiffs do re-assign the messuage and hereditaments comprised in their said respective four mortgage securities free and clear of and from all incumbrances done by the plaintiffs or any person or persons claiming by, from, or under them, and deliver up upon oath all the title deeds and writings in their custody or power relating to the said premises, to the said defendants, or to such one of them as shall so redeem the plaintiffs, or as

(a) The minutes sufficiently appear from the order made on this summons.

(b) For a fuller form in case of a mortgagee in possession, see *Seton*, p. 1066.

he or they shall direct, such assignment or assignments to be settled by the judge in case the parties differ about the same. But in default of the said defendants, or either of them, so redeeming the plaintiffs by the time aforesaid, the defendants are from thenceforth to stand absolutely debarred and foreclosed of and from all right, title, interest, and equity of redemption, of, in, and to the messuages and hereditaments comprised in the said four mortgage securities and every part thereof. Any of the parties are to be at liberty to apply as they may be advised.

54. ORIGINATING SUMMONS BY FIRST MORTGAGEES OF FREEHOLDS AGAINST THE PURCHASERS OF THE EQUITY OF REDEMPTION AND SECOND MORTGAGEES.

1886, N., No.

In the High Court of Justice,
Chancery Division.

Mr. Justice

Between *G. N.* and *W. N.* Plaintiffs,

and

The X. Company Limited [and *J. J. M.*,

F. G., *W. C. G.*, *R. G.*, *H. G.*, *J. C. S.*,

and *C. E. B.*, by order dated the

day of March, 1887.] (a) Defendants.

Let the defendants interested in the equity of redemption of the messuage and hereditaments comprised in the mortgage hereinafter mentioned, attend at the chamber of Mr. Justice , at the Royal Courts of Justice, Strand, London, at the time specified in the margin hereof, upon the application of *G. N.*, of , in the county of , and *W. N.*, of , in the county of , who claim to be interested in the relief sought as mortgagees, for an order (under the rules of the Supreme Court, Order LV., r. 5a), that an account may be taken of what is due to the plaintiffs for principal, interest, and costs on a mortgage, dated the day of , 1878, and made between *J. P. F.* of the one part and the said *G. N.*, *C. D.* (since deceased), and the plaintiff *W. N.* of the other part (being a mortgage of No. 19, Road), and that the said mortgage may be enforced by foreclosure or sale.

Dated the day of , 1886. (b)

[Conclude as in Form 23, p. 366.]

(a) These parties were added by amendment.

(b) While the order on this summons was in draft, but after the order Form 53 had been passed and entered, the plaintiffs' solicitors received notice of an order to wind-up the said *X. Company Limited* under supervision; also that there was a second mortgage on the house No. 19 referred to in this summons, and on one of the houses comprised in the summons Form 52. Accordingly the summonses set out in the next three forms were taken out, and will be useful as showing the practice in similar cases.

**55. ORDINARY SUMMONS FOR LEAVE TO AMEND SUMMONS,
FORM 54. (a)**

1886, N., No.

In the High Court of Justice,
Chancery Division.

Mr. Justice .

Between *G. N.* and *W. N.*, Plaintiffs,
and

The X. Company Limited, Defendants.

Let all parties concerned attend at the chambers of Mr. Justice ., in the Royal Courts of Justice, Strand, Middlesex, on day, the day of March, 1887, at o'clock in the noon, on the hearing of an application on the part of the plaintiffs, that notwithstanding the order made herein, and dated the March, 1887, the drawing up thereof may be stayed, and the Originating Summons herein may be amended by the names of *J. J. M.*, *F. G.*, *W. C. G.*, *R. G.*, and *H. G.*, *J. C. S.*, and *C. E. B.* being added as parties defendants to this action, and that the costs of this application may be defendants' costs in any event.

Dated March, 1887.

This summons was taken out by ., of ., in the county of ., solicitors for the applicants.

To the defendants and

Mr. their solicitor. (b)

**56. ORDINARY SUMMONS FOR LEAVE TO PROSECUTE FORE-
CLOSURE ACTION NOTWITHSTANDING WINDING-UP
PROCEEDINGS.**

188 . No.

In the High Court of Justice,
Chancery Division.

Mr. Justice .

In the matter of the Companies Acts, 1862 and 1867, and

In the matter of the *X. Company Limited*

and

Between *G. N.* and *W. N.* Plaintiffs,
and

W. H. G. and the *X. Company Limited*, Defendants.

Let all parties concerned attend at my chambers in the Royal Courts of Justice, Strand, Middlesex, on the day of March, 1887, at of the clock in the noon, on the hearing of an application on the part of *G. N.* and *W. N.* the plaintiffs in an action of *N. and another v. G.* and the *X. Com-*

(a) As a rule an Originating Summons can be amended without a formal order or summons, see *Dan. F.*, p. 435, note (o), but there were special circumstances in this case.

(b) An order was made on this summons in the terms thereof.

pany Limited, 1886, N. that the applicants may be at liberty to prosecute the said action against the above-mentioned *X. Company Limited* and its official liquidator, notwithstanding the order made in the above-mentioned matters and dated the day of March, 1887, for winding-up of the said *X. Company Limited*. (a)

Dated the day of March, 1887.

This summons was taken out by , of , in the county of .

Solicitors for the applicants.

To the official liquidator of the above-named

X. Company and their solicitors.

57. ORIGINATING SUMMONS BY FIRST MORTGAGEES AGAINST SECOND MORTGAGEES OF PART OF THE PROPERTY COMPRISED IN THE ACTION, FORM 52, WHO WERE DISCOVERED AFTER THE ORDER FOR FORECLOSURE THEREIN HAD BEEN MADE.

In the High Court of Justice, 188 . No.
Chancery Division.

Mr. Justice

Between *G. N.* and *W. N.* Plaintiffs,
and

J. J. M., *F. G.*, *W. C. G.*, *R. G.*, *H. G.*,

J. C. S., and *C. E. B.* Defendants.

Let the defendants *J. J. M.*, of , *F. G.*, *W. C. G.*, *R. G.*, *H. G.*, and *J. C. S.*, all of , and *C. E. B.*, of , the persons interested in the equity of redemption of the messuages and hereditaments comprised in the mortgages hereinafter mentioned, attend at the chambers of Mr. Justice , at the Royal Courts of Justice, Strand, London, at the time specified in the margin hereof, upon the application of *G. N.*, of , and *W. N.*, of , who claim to be interested in the relief sought as first mortgagees, for an order (under the Rules of the Supreme Court, Order LV., r. 5a) that an account may be taken of what is due to the plaintiffs for principal, interest, and costs on a mortgage dated the day of , 1878, and made between *W. H. G.* of the one part and the said *G. N.*, *C. D.* (since deceased), and *W. N.* of the other part (being a mortgage of No. Road, and on a mortgage of the same date made between the same parties (being a mortgage of No. Road), and on a mortgage of the same date made between the same parties (being a mortgage of No. Road), and on a mortgage of the same date made between the said parties (being a mortgage of No. Road), and that the said mortgages may be enforced by foreclosure in the terms of the minutes annexed to this summons. And that if and so far as necessary this action may be taken as supplemental to the action of *N. and another v. G.*, 1886, N., No.

Dated, &c,

[Conclude as in Form 20, p. 358.]

(a) A similar summons was taken out in the other foreclosure action, Form 54, p. 407.

58.—ORDER MADE ON SUMMONS, FORM 57,[*Omitting formal parts.*]

It is ordered that

1. An account be taken of what is due to the plaintiffs under and by virtue of all their mortgage securities, that is to say, an indenture of mortgage dated the _____, 1878, and made between *W. G.* of the one part, and *G. N. C. D.* (since deceased), and *W. N.* of the other part, (being a mortgage of No. _____ Road), also an indenture of mortgage of the same date, and made between the same parties (being a mortgage of No. _____ Road), also an indenture of mortgage of the same date, and made between the same parties (being a mortgage of No. _____ Road), also an indenture of mortgage of the same date and between the same parties (being a mortgage of No. _____ Road), and for the costs of the plaintiffs of this action, such costs to be taxed by the taxing master.

2. An account of the rents and profits of the messuages and hereditaments comprised in the said mortgages received by the plaintiffs *G. N.* and *W. N.*, or by either of them, or by any other person or persons, by the order or for the use of the plaintiffs, or either of them, or which, without the wilful default of the plaintiffs, might have been so received. And it is ordered that what shall appear to be due on account No. 2 be deducted from what shall appear to be due on account No. 1, and that the balance be certified. And it is ordered that upon the defendants, or any or either of them, paying to the plaintiffs what shall be certified to be the balance due to them as aforesaid within six calendar months after the date of the chief clerk's certificate, at such time and place as shall be thereby appointed, the plaintiffs do re-assign the messuages and hereditaments comprised in their said respective mortgage securities, free and clear of and from all incumbrances done by the plaintiffs, or any person or persons claiming by, from, or under them, and deliver up (upon oath if required) all the title deeds and writings in their custody or power, relating to the said premises, to such of the defendants as shall redeem the said mortgaged messuages and hereditaments, or as they or he shall direct, such assignment or assignments to be settled by the judge in case the parties differ. But this order is to be without prejudice to any question which may arise as to the rights or interests of the defendants as between themselves, to or in the said mortgaged messuages and hereditaments. But in default of the defendants, or any or either of them, paying to the plaintiffs what shall be certified to be due to them as aforesaid, by the time aforesaid, the defendants *J. J. M.*, *F. G.*, *W. C. G.*, *R. G.*, *H. G.*, *J. C. S.*, and *C. E. B.*, are from thenceforth to stand absolutely debarred and foreclosed of and from all right, title, interest, and equity of redemption of, in, and to the messuages and hereditaments comprised in the said mortgage securities and every part thereof. And any of the parties are to be at liberty to apply as they may be advised. (*a*)

(*a*) An order was subsequently made consolidating this action with that of *N. v. G.*, Form 52, p. 405.

59. ORIGINATING SUMMONS BY FIRST MORTGAGEES OF FREEHOLDS AND COPYHOLDS AGAINST A SECOND MORTGAGEE.

1887, N. No.

In the High Court of Justice,
Chancery Division.

Mr. Justice

Between *C. N.*, *W. M.*, and *E. D.* Plaintiffs.
and

M. C., widow. (*a*) Defendant.

Let the defendant, *M. C.*, of , in the county of , widow, a person interested in the equity of redemption of the messuage and hereditaments comprised in the mortgage hereinafter mentioned, attend at the chambers of Mr. Justice , at the Royal Courts of Justice, Strand, London, at the time specified in the margin hereof, upon the application of *C. N.*, of , in the county of , *W. M.*, in the county of , esquire, and *E. D.*, of , in the county of , who claim to be interested in the relief sought as first mortgagees, for an order (under the Rules of the Supreme Court, Order LV., r. 5 *a*) that an account may be taken of what is due to the plaintiffs for principal, interest, and costs, under an indenture of mortgage dated the day of , 1876, made between *W. T.* of the one part and the said *C. N.* and also *W. N.* (since deceased) of the other part, and a conditional surrender, dated the day of , 1876, made by the said *W. T.* in favour of the said *C. N.* and *W. N.* (being respectively a mortgage of freehold and copyhold hereditaments in the parish of T., in the county of), and that the said mortgage may be enforced by foreclosure or sale in accordance with the minutes annexed to this summons.

Dated this day of , 18 .

[*Conclude as in Form 20, p. 358.*]

60. AFFIDAVIT IN SUPPORT OF SUMMONS, FORM 59.

[*Title as in Summons.*]

We, *A. H.*, of , in the county of , the actuary and resident secretary of the company, of which company the plaintiff *C. N.* is the chairman, and the plaintiffs *W. M.* and *E. D.* are two of the directors, and *W. B.*, of No. , in the county of , solicitor, managing clerk to , of the same place, solicitors to the said company, severally make oath and say as follows :

And I the said *A. H.* for myself say :

1. By an indenture of mortgage, dated the day of , 1876, and made between *W. T.* of the one part and *C. N.* one of the above-named plaintiffs, and *W. N.* (since deceased) of the other

(*a*) In this case the mortgagor had become bankrupt, and his trustee had disclaimed ; accordingly only the second mortgagee was made defendant.

part, and which indenture is now produced, and shown to me, and marked *A. H. 1*, the said *W. T.* mortgaged certain freehold property, and covenanted to surrender, and subsequently did surrender, certain copyhold property (the subject-matter of this action), situate in , in the parish of , in the county of , to the said *C. N.* and *W. N.*, to secure the repayment of the principal sum of 650*l.*, and such further sum or sums not exceeding in the whole the sum of 200*l.* as should or might thereafter be advanced to the said *W. T.* by the said *C. N.* and *W. N.*, with interest at *l.* per cent. per annum, and which said sum of 200*l.* was subsequently advanced, namely, on the , 1877.

2. By a conditional surrender now produced and shown to me, and marked *A. H. 2*, the said *W. T.* on the day of , 1876, in pursuance of his covenant in that behalf contained in the said indenture marked *A. H. 1*, duly surrendered the said copyhold property to the use of the said *C. N.* and *W. N.*, their heirs and assigns, subject to the condition for making void the said surrender on payment as therein mentioned.

3. The said *W. N.* died on the , 1879.

4. By an indenture of transfer indorsed on the said indenture, marked *A. H. 1*, and dated the , 1880, and made between the said *C. N.* of the one part, and the said *C. N.*, *W. M.*, and *E. D.*, the above-named plaintiffs, of the other part, the said *C. N.* assigned and conveyed unto the plaintiffs, the said *C. N.*, *W. M.*, and the said *E. D.* the said mortgage debt and the freehold and copyhold property comprised in the said indenture of mortgage, subject to the equity of redemption subsisting therein.

And I, the said *W. B.*, for myself say as follows:—

5. I have read the *London Gazette* of the , 1886, from which, on page , it appears that *W. T.*, of , was adjudicated a bankrupt on the , 1886.

6. The said *W. T.*, in the said *London Gazette* mentioned is the same person as “*W. T.*” referred to in the first paragraph of this affidavit.

7. I have also read the office copy certificate of the Board of Trade in the bankruptcy proceedings of the said *W. T.*, from which it appears that *H. W. F.*, of , in the City of London, accountant, was on the , 1886, appointed a trustee of the said *W. T.*'s estate.

8. I know and am acquainted with the said *H. W. F.* He is the same person as “*H. W. F.*” referred to in the next succeeding paragraph of this affidavit.

And I, the said *A. H.*, for myself further say as follows:

9. On or about the , 1886, I received from Mr. *H. W. F.* the notice of disclaimer now produced, and shown to me, and marked *A. H. 3*.

And I, *W. B.*, for myself, further say:

10. It being doubtful, from the wording of the said notice of disclaimer, whether the said disclaimer was intended to apply to the copyhold portion of the property, the subject-matter of this action. I, on behalf of the said Messrs. , on the ,

1887, wrote a letter to the said *H. W. F.*, of which the following is a copy :

. London.

1887.

Dear Sir,

Re T.

On the 1886, you as trustee in the bankruptcy of *W. T.* executed a disclaimer, of which we send you, on the other side, a copy. The first mortgage therein referred to comprises a small piece of copyhold land, adjoining the freehold property, to which alone the disclaimer relates, and as our clients, the first mortgagees, are now about to commence an action of foreclosure against the second mortgagee, we should be glad to know whether you intended your disclaimer to apply to such copyhold land, and also whether you now disclaim all the freehold and copyhold property comprised in the said first mortgage. If you do not, we shall be obliged to make you a defendant in this action.

Yours truly,

H. W. F., Esq.

In answer to such letter the said Messrs. , on or about the , 1887, received the letter dated the , 1887, now produced and shown to me, and marked *W. B.*

11. In the course of correspondence consequent upon the bankruptcy of the said *W. T.*, I incidentally became aware of the fact of the said *W. T.* having effected a further charge upon the hereditaments, the subject of this action, and upon inquiring of him for particulars thereof, he produced what purported to be a copy of an equitable charge in favour of the defendant *M. C.*

And I, the said *A. H.*, for myself, further say :

12. There is now due and owing to the said *C. N.*, *W. M.*, and *E. D.*, in respect of the said mortgage, the principal sum of 850*l.*

13. On the , 1886, the said plaintiffs *C. M.*, *W. M.*, and *E. D.* entered into the receipt of the rents and profits of the said freehold and copyhold property, and there is, assuming the validity of the equitable charge referred to in the 11th paragraph of this affidavit, now due and owing to the defendant in respect of such rents and profits, after deducting the sum of 63*l.* 6*s.*, due to the plaintiffs for interest and fire insurance premium, the sum of *l.* or thereabouts.

Sworn, &c.

Filed, &c.

61. ORIGINATING SUMMONS TO ENFORCE A CHARGING ORDER. (a)

In the High Court of Justice, 188 . No.
Chancery Division.

Mr. Justice , by Certificate.

Between *R. N.* Plaintiff.

and

S. H.... .. Defendant.

Let the defendant *S. H.*, the judgment debtor, and the person

(a) As to this mode of proceeding, see *Leggott v. Western* (12 Q. B. Div. 287 ; 53 L. J. 316, Q. B. ; 32 W. R. 460).

against whom the charging order hereinafter mentioned was obtained, attend at the chambers of Mr. Justice _____, at the Royal Courts of Justice, Strand, London, at the time specified in the margin hereof, upon the application of *R. N.*, of _____, in the county of _____, the judgment creditor and person entitled to the benefit of the said charging order, that an account may be taken of what is due to the plaintiff for principal, interest, and costs, or otherwise, under or by virtue of a certain charging order dated the _____ day of _____, 1888, and made absolute on the _____ day of _____, 1888, by his Lordship Mr. Justice _____, in the matter of the trusts of an indenture of settlement dated the _____ day of _____, 1860, and in the matter of the personal estate of *E. E. H.* intestate, and in the matter of the estate of *G. B.*, deceased, and in an action of *E. N.* against *J. F.* and another, and that such charging order may be enforced by foreclosure, or sale, and that the sum of _____ *l.* and all other sums (if any) which under a certain order, dated _____ day of _____, 1887, mentioned in the said charging order, are payable to the defendant *S. H.* out of the proceeds of the _____ *l.* _____ *l.* per Cent. Stock of the _____ Company in court to the credit of "*Re H.* _____, 18 _____ *H.* Personal estate of *G. B.*, deceased," mentioned in the said charging order, and out of the funds to be lodged to the same credit, may be paid to the plaintiff, and if necessary that the defendant *S. H.* may be ordered to execute and do such assurances, acts, and deeds as may be necessary for enabling the plaintiff to receive the said sum of _____ *l.* and other sums.

Dated, &c.

[Conclude as in Form 23, ante, p. 366.]

62. ORDER MADE ON SUMMONS, FORM 61.

[Omitting formal parts.]

It is ordered that an account be taken of what is due to the plaintiff under and by virtue of the said charging order and for his costs of this action to be taxed, and upon the defendant paying to the plaintiff what shall be certified to remain due to him as aforesaid within six calendar months after the date of the chief clerk's certificate at such time and place as shall be thereby appointed, it is ordered that the plaintiff do deliver up upon oath, if required, all documents in his custody or power relating to his aforesaid security to the defendant, but in default of the defendant paying to the plaintiff what shall be so certified to be due to him as aforesaid by the time aforesaid, the judge doth declare that the plaintiff will be absolutely entitled to the amount payable to the defendant as aforesaid and affected by the said charging order, free from all right, title, interest, and equity of redemption by the defendant, and in that case it is ordered that the defendant from thenceforth stand absolutely debarred and foreclosed from all right, title, interest, and equity of redemption of, in, and to the said amount.

Liberty to apply.

63. ORIGINATING SUMMONS FOR THE APPOINTMENT OF NEW TRUSTEES AND A VESTING ORDER (UNDER ORDER LV., R. 13 (A), DEC., 1888). (a)

[Reference to record.]

In the High Court of Justice,
Chancery Division.

Mr. Justice

In the matter of the trusts of the will and codicil of
M. P., widow, deceased, dated respectively the
day of , 1865, and the day of ,
1873.

And in the matter of the Trustee Act, 1850, and of
the Act, 15 & 16 Vict. c. 55, intituled, "An Act to
extend the provisions of the Trustee Act, 1850." (b)

Let the respondent, A. R. B., the legal personal representative
of the last surviving trustee of the will of the above-named M. P.,
attend at the chambers of Mr. Justice , at the Royal Courts
of Justice, Strand, at the time specified in the margin hereof, upon
the application, under Order LV., r. 13 (a), of the Rules of the
Supreme Court, of M. B. L., the wife of H. D. L., of , in
the county of , Esq., the said H. D. L., R. M. P., of ,
in the county of , spinster, a person of unsound mind, by
the said M. B. L., as committee of her estate; J. H. L., of ,
a captain in ; W. H. P. L., of ; C. F. H. L., of
, merchant; R. M. L., of , spinster; and D. H. L.,
of , an infant under the age of twenty-one years, by the
said H. D. L., his father and next friend, being respectively *cestuis
que trusts* under the said will.

1. That A. B., of , in the county of , [occupation],
and C. D., of , in the county of , [occupation], may
be appointed trustees of the will dated the day of ,
1865, of the said M. P., in the place of H. B. and R. S. P. respec-
tively, deceased.

2. That the messuages, tenements, lands, and hereditaments,
situate in , now subject to the trusts of the said will, and
all other, if any, the lands and hereditaments so subject may vest
in the said A. B. and C. D. as such trustees as aforesaid, for the
estate and interest therein now vested in the said A. R. B.

3. That the right to call for a transfer of and to transfer into their
own names the sum of l. Consolidated Stock, and the sum
of l. 4l. Debenture Stock of the Railway Company,
respectively, subject to the trusts of the said will, and to receive
the dividends now due and to accrue due thereon, may be vested in
the said A. B. and C. D. as the trustees thereof.

4. That the right to sue for and recover any chose in action

(a) See *ante*, p. 121 *et seq.*, and *Addenda*; and for Form of *Petition*,
see Dan. F. 2065.

(b) It will not be necessary to entitle the summons in the second Act
unless relief thereunder is asked for. As for instance if an order vesting
the right to transfer stock is required.

subject to the trusts of the said will may vest in the said *A. B.* and *C. D.* as such trustees of the said will.

5. That the costs of this application may be properly provided for.

Dated, &c.

NOTE.—The order to be made on this summons is sought under sects. 32, 34, and 35 of the Trustee Act, 1850, and sect. 9 of the Act 15 & 16 Vict. c. 55. (a)

[*Conclude as in Form 23, p. 366.*]

The consent of the new trustees to act and the affidavit of their fitness can be readily adapted from the corresponding forms under the Settled Land Acts, *post*, p. 420.

64. ORIGINATING SUMMONS UNDER THE VENDOR AND PURCHASER ACT, 1874. (b)

18 .

In the High Court of Justice,
Chancery Division.

Mr. Justice

In the matter of the contract dated the day
of , 18 , for the sale of freehold hereditaments, known as "The Farm," in the parish of , in the county of , made between *H. L.*, the Rev. *R. G.*, and *H. A. L.* of the one part, and *W. T.* of the other part,
and

In the matter of the Vendor and Purchaser Act,
1874. (c)

Let *H. L.*, *R. G.*, and *H. A. L.*, the vendors, attend at the chambers of Mr. Justice , at the Royal Courts of Justice, Strand, at the time specified in the margin hereof, upon the application of the above-named *W. T.*, of , in the county of , gentleman, the purchaser, that it may be declared that the objections of the said *W. T.* to the title to the hereditaments comprised in the above-mentioned contract have not been sufficiently answered by the vendors; and that a good title to the said hereditaments has not been shown. (d)

Dated, &c.

[*Conclude as in Form 23, p. 366.*]

(a) As to this note, see p. 126, *ante*.

(b) See *ante*, p. 172.

(c) As to the title, see *ante*, p. 332, and Seton, vol. 2, p. 1318, and as to the form generally, see Dan. F. 1525.

(d) In a proper case add, "And that the said *W. T.* is entitled to a return of the deposit of *l.* with interest, and that the [*vendors*] may be ordered to return and pay the same accordingly, and that the [*vendors*] may be ordered to pay the costs of this application."

65. STATEMENT OF AGREED FACTS TO ACCOMPANY SUMMONS, FORM 64.

[*Insert short Title and Reference to Record.*]

Statement of agreed facts.

1. The Rev. *R. G.*, *H. L.*, and *H. A. L.*, as trustees of an indenture, dated the day of , 1851, have lately agreed with *W. T.* for the sale to him of certain freehold hereditaments, known as The Farm, in the parish of , in the county of , at the price of *l.*, the purchaser taking to the cultivations at a valuation.

2. The vendors were constituted trustees by and represent persons beneficially interested in the said premises under the will, dated the day of , 1830, of *W. C. B.*, who died in the year 1842, a copy of such will is hereto annexed, marked A.

3. Such persons were in events which have happened the four only daughters of the said testator. Three of them are spinsters, and one is married.

4. The said daughters were the co-heiresses at law of the said testator, and the youngest of them is aged sixty-two years, or thereabouts.

5. The purchaser has objected to the title on the ground that under the said will the said daughters only took life estates in the property, with remainder to their respective issue (if any), and further that, if any of such daughters should die without leaving issue to attain twenty-one, but leaving a husband her surviving, such husband would acquire a life interest in the property.

6. The vendors, on the other hand, contend either that the said daughters took life interests under the said will, with remainder on the death of the survivor of them to themselves as tenants in common in fee simple as co-heiresses at law of the testator, or that they were tenants in common in tail under the said will, and that the interests (if any) limited to their respective husbands are void for remoteness.

ADDITIONAL FORMS UNDER THE SETTLED LAND ACTS. (a)

FORMS ON APPLICATIONS FOR APPOINTMENT OF TRUSTEES OF THE SETTLEMENT (SECTS. 38, 59, AND 60). (b)

66. SUMMONS BY A TENANT FOR LIFE OF FULL AGE.

In the High Court of Justice, 1888, C., No.
Chancery Division.

Mr. Justice

[By certificate.] (c)

In the matter of a certain freehold house, called
situate at street, W., in the
county of , with the grounds and fields
thereto belonging, containing together about
acres, more or less, and of a freehold
cottage, called , situate at street,
aforesaid, and also the gardener's cottage
near thereto, settled by the will of W. C., dated
the day of , 1874,
and

In the matter of Settled Land Act, 1882.

Let (d) [all parties concerned] attend at my chambers, at the
Royal Courts of Justice, Strand, London, on the
day of , 1888, at o'clock, in the forenoon, on the
hearing of an application on the part of M. H. (the wife of T. W. H.),
the tenant for life under the settlement created by the above-men-
tioned will in the above mentioned hereditaments.

1. That E. T., of , in the county of , spinster,
and W. G. C., of street, in the county , [occupation],
may be appointed trustees under the settlement created by the
above-mentioned will, in the above-mentioned hereditaments, for the
purposes of the above-mentioned Act.

2. That the costs of this application may be directed to be taxed
as between solicitor and client, and that the same when taxed may
be paid out of the property subject to the said settlement, and
that for that purpose all necessary directions may be given.

Dated the day of , 1888.

This summons was taken out by , of , solicitor
for the applicant.

To W. G. C., of , in the county of — — —,
W. C. S., of , in the county of — — —, and
E. S., of , in the county of — — —,

surviving trustees of the will of the above-named W. C., deceased.

(a) For Government forms, see *ante*, p. 240 *et seq.*, and observe note on p. 239.

(b) See *ante*, pp. 215, 229.

(c) These words were inserted because it was necessary to make the application before the judge in whose court an action was pending to administer the estate.

(d) In lieu of the words in [] it would be better to insert the names of the respondents describing them as the trustees of the will of the above-named W. C., deceased.

If you do not attend either in person or by your solicitor [at the time and place above-mentioned], (a) such order will be made and proceedings taken as the judge may think just and expedient.

Before you will be heard in chambers, you will have to enter an appearance in the central office, and give notice of such appearance.

67. AFFIDAVIT OF TENANT FOR LIFE FILED IN SUPPORT OF SUMMONS, FORM 66.

[*Title as in Summons.*]

Filed 1888.

I, *M. H.* (the wife of *T. W. H.*), (b) of No. road, in the county of , make oath and say as follows:—

1. By the above-mentioned will the above-mentioned house, grounds, fields, cottages, and hereditaments stand limited upon trusts under which I am beneficially entitled in possession as tenant for life.

2. *W. G. C.*, *W. C. S.*, and *E. T.* are the surviving trustees of the said will, but they have no power of sale or of consenting to or approval of the exercise of the power of sale of the said hereditaments and premises until after my death, and at present there are no trustees of the settlement created by the said will in the said hereditaments and premises for the purposes of the said Act.

3. The said testator died on the day of June, 1874.

4. On the day of October, 1874, a suit was instituted by bill of complaint for the purpose of having the real and personal estate of the said testator administered by the court.

5. By the decree made in the said suit on the day of December, 1874, the usual accounts and inquiries were ordered to be taken and made, including an inquiry what real estate the said testator was seised of or entitled to at the time of his death, distinguishing such parts thereof as were specifically devised.

6. By the chief clerk's certificate, filed in the said suit on the day of , 1876, it was found that the above-mentioned hereditaments formed part of the real estate of which the said testator was seised at the time of his death.

7. By an indenture dated the of , 1877, and made between the said *W. G. C.*, *W. C. T.* and *E. T.* of the one part, and *C. A. B.*, of the other part, the said premises called House, with the gardens and lands adjoining thereto, and occupied therewith and containing by estimation about twenty-three acres more or less, were, with the sanction of the court, demised to the said *C. A. B.* for the term of fourteen years from the day of , 1875, at the yearly rent of 190*l.*

(a) If the time has been altered by indorsement, instead of the words in [] insert "at the place above-mentioned, at the time mentioned in the indorsement hereon."

(b) As the husband and wife were not living together in this case the address of the husband is not given.

8. The said suit was heard on further consideration on the day of 1876.
9. By a memorandum of agreement dated the day of , 1877, and made between the said *W. G. C.*, *W. C. S.*, and *E. T.* of the first part, and *H. G.*, *G. F. G.* and *C. E. G.* of the second part, a conditional agreement was entered into for settling the boundary between the above-mentioned hereditaments and certain adjoining hereditaments.
10. By an order made in the said suit on day of , 1877, it was ordered that the last-mentioned agreement should be carried into effect, and the same was accordingly carried into effect by indentures of mutual conveyance, dated respectively the day of , 1878, and made between the said *W. G. C.*, *W. C. S.*, and *E. T.* of the first part, *A. T.* of the second part, *W. W.* of the third part, and *J. T.* of the fourth part.
11. I attained the age of twenty-one years on day of 1883.
12. By an order made in the said suit on the day of 1884, it was order that I should be let into possession of my estate and receipt of the rents thereof as from the day of , 1883, and ever since that date I have received the rents and profits of the above-mentioned hereditaments.
13. On the day of , 1885, I intermarried with *A. H.*, but no settlement was made on such marriage.
14. By decree *nisi* of the Probate, Divorce, and Admiralty Division of the High Court of Justice, made on the day of , 1887, the said marriage was dissolved, and on the day of , 1888, the said decree was made absolute.
15. On the day of , 1888, I intermarried with the said *T. M. H.*, but no settlement was made upon such marriage.
16. The ——— company have made an advantageous offer to purchase the above hereditaments, and I am desirous of accepting such offer.

Sworn at No. , in the city of
London this day of , 1888.

Before me *A. B.*,

A commissioner to administer oaths in the
Supreme Court of Judicature in England.

This affidavit is filed on
behalf of the said *M. H.*

68. CONSENT OF TRUSTEE TO ACT AND VERIFICATION THEREOF. (a)

[Insert short title and reference to the record.]

We, *E. T.*, of , in the county , spinster, and
W. G. C., of , in the county of , [occupation], do
hereby consent to act as trustees under the settlement created by
the will dated the day of , 18 , of *W. C.*, late of
, in the county of , in the hereditaments above

(a) See Order XXXVIII., r. 19a, ante, p. 45.

mentioned or referred to for the purposes of the above-mentioned Act.

Dated the day of , 1888.
(Signed)

E. T.
W. G. C.

I, *H. S. C.*, of , in the county , solicitor, hereby certify that the above-written signatures are the signatures of *E. T.* and *W. G. C.*, the persons mentioned in the above-written consent.
(Signed) *H. S. C.*

69. AFFIDAVIT OF FITNESS OF TRUSTEE. (a)

[*Title as in Summons.*]

Filed 1888.

I, *E. F.*, of street, *W.*, in the county of sub-comptroller (*b*) in office, make oath and say as follows:—

1. I have for eleven years last past known and been well acquainted with *W. G. C.*, of , in the county of [*occupation*] one of the persons proposed to be appointed trustees under the settlement created by the above-mentioned will in the above-mentioned hereditaments for the purposes of the above-mentioned Act.

2. The said *W. G. C.* has retired from business, but has for many years last past been engaged in local work at *W.* aforesaid as a member of two important public bodies.

3. I have always understood and believed that the said *W. G. C.* is a person of independent means. He lives in a freehold house of his own at aforesaid, of the annual value of *l.* or thereabouts. (*c*)

4. I have had many opportunities of judging as to the character and habits of the said *W. G. C.* He is a person of good credit and of thorough respectability and integrity, and of businesslike habits.

5. In my judgment the said *W. G. C.* is a fit and desirable person to be appointed trustee under the said settlement, and I verily believe that he will fulfil the duties of that office in a proper manner.

Sworn, &c.

This affidavit is filed, &c.

(a) One affidavit of fitness by a deponent whose evidence can be relied upon is sufficient, see *Re Arden*, *W. N.*, 1887, p. 166. This was a petition in lunacy and in Chancery. Of course a similar affidavit would have to be filed as to the other trustee.

(b) The word "gentleman" in an affidavit of fitness is not a sufficient description of the deponent, see *Re Orde* (49 *L. T. Rep. N. S.* 430; 24 *Ch. Div.* 271), *ante*, p. 126.

(c) The affidavit of fitness should show something as to the position of the proposed trustees in respect of their pecuniary means. *Per Kay, J.* in *Re Castle Sterry's Trust*, *W. N.*, 1888, p. 179.

70. SUMMONS BY AN INFANT ABSOLUTELY ENTITLED. (a)

1884, W., No. .

In the High Court of Justice,

Chancery Division.

Mr. Justice

In the matter of one equal undivided fifth share of a freehold messuage called _____ House, with the stable, coach-house, outbuildings, yards, and gardens thereto, situate in _____ Street, in the town of _____, in the county of _____ settled land, within the meaning of the Settled Land Act, 1882, s. 59, by reason of *H. G. P. W.*, the person seised of or entitled to such share being an infant, and _____

In the matter of the Settled Land Act, 1882.

Let all parties concerned (b) attend at the chambers of Mr. Justice _____, at the Royal Courts of Justice, at the time specified in the margin hereof, on the hearing of an application of *H. G. P. W.*, an infant, by *J. G. S.*, of _____, in the county of _____ [occupation], his next friend.

1. That *J. J. S.*, of _____, in the county of _____, and *C. W. R. S.*, of the same place, may be appointed trustees of the settlement deemed to be existing under the above-mentioned Act of the above-mentioned share of the said infant for the purposes of the said Act.

2. That the powers conferred upon a tenant for life by sects. 3 to 5, both inclusive, sect. 15, and sect. 19 to 24, both inclusive, and sect. 31 of the above-mentioned Act, and all other powers of sale, and powers ancillary thereto conferred by the said Act upon a tenant for life, may be exercised by the said *J. J. S.* and *C. W. R. S.*, on behalf of the said *H. G. P. W.* during his minority. Or that such other order may be made in the premises as will enable the said undivided fifth share to be sold, together with the remaining undivided shares of the above-mentioned hereditaments.

3. That the costs of this application, &c. [*as in Form 66, p. 418.*]

Dated the _____ day of _____ 1884.

This summons was taken out by _____, of _____, in the county of _____, solicitor for the above-named *H. G. P. W.* and *J. J. S.* (c)

71. ORDER MADE ON SUMMONS, FORM 70.

[*Omitting formal parts.*]

The judge being of opinion that it is for the benefit of the infant applicant that the above-mentioned, one equal undivided fifth share of the said freehold messuage and premises, should be sold with

(a) In this case trustees of the settlement were asked for.

(b) In this case the summons was not served on anyone as there were no existing trustees.

(c) As no one was served with this summons the remaining formal parts of the conclusion are not required.

the remaining four equal undivided fifth shares thereof, the judge doth hereby appoint *J. J. S.* of _____, in the county of _____, and *C. W. R. S.* of the same place _____, trustees of the settlement, and to exercise on behalf of the above-named infant *H. G. P. W.* the powers conferred upon a tenant for life by sects. 3 to 5, both inclusive, and sects. 19 to 24, both inclusive, and sect. 31, and all other powers of sale, and powers ancillary thereto, conferred by the said Act upon a tenant for life during his minority. And it is ordered that it may be referred to the taxing master to tax, as between solicitor and client, the costs of this application, and consequent thereon and of the said sale, and incidental thereto, and that the same when taxed may be paid by the said *J. J. S.* and *C. W. R. S.* out of moneys in their hands to arise by such sale.

72. SUMMONS BY AN INFANT ABSOLUTELY ENTITLED.(a)

In the High Court of Justice,
Chancery Division.

1888, W., No.

Mr. Justice _____

In the matter of one equal undivided fifth share of a freehold messuage called _____ House, with the outbuildings and garden thereto, situate in _____ street, in the town of _____, in the county of _____ settled land within the meaning of the Settled Land Act, 1882, sect. 59, by reason of *C. M. W.* and *E. E. W.*, the persons seized of or entitled to such share as co-parceners being infants; and

In the matter of the Settled Land Act, 1882.

Let all parties concerned(b) attend at the chambers of Mr. Justice _____ at the Royal Courts of Justice, at the time specified in the margin hereof, on the hearing of an application of *C. M. W.* and *E. E. W.*, infants, now residing at _____, in the colony of New Zealand, by *J. J. S.*, of _____, in the county of _____ their next friend.

1. That the powers conferred upon a tenant for life by sects. 3 to 5, both inclusive, and sect. 15 and sects. 19 to 24, both inclusive, and sect. 31 of the above-mentioned Act, and all other powers of sale, and powers ancillary thereto, conferred by the said Act upon a tenant for life, may be exercised by the said *J. J. S.* and *C. W. R. S.* on behalf of the said *C. M. W.* and *E. E. W.* during their respective minorities, or that such other order may be made in the premises as will enable the said undivided fifth share to be sold, together with the remaining undivided shares of the above-mentioned hereditaments.

2. That the costs, &c., [as in Form 66, p. 418.]

[Conclude as in Form 70, p. 422.]

(a) In this case trustees of the settlement were not asked for, but see *ante*, p. 229.

(b) In this case the summons was not served on anyone, as there were no existing trustees.

73. ORDER UPON SUMMONS, FORM 72.[*Omitting formal parts.*]

It is ordered that the said *J. J. S.* and *C. W. R. S.* be, and they are hereby appointed to exercise the powers conferred upon a tenant for life by sects. 3 to 5, both inclusive, and sect. 15 and sects. 19 to 24, both inclusive, and sect. 31 of the above-mentioned Act and all other powers of sale, and powers ancillary thereto, conferred by the said Act upon a tenant for life, on behalf of the said *C. M. W.* and *E. E. W.* respectively during their respective minorities. And it is ordered that the money to arise by the sale of the said infant's one-fifth share of the above-mentioned messuage and premises be paid into court, to the credit of "*Re C. M. W. and E. E. W. infants, as joint tenants,*" and it is ordered that the costs, &c.

74. SUMMONS BY INFANTS ABSOLUTELY ENTITLED TO SHARES OF PARTNERSHIP LAND. (a)

In the High Court of Justice,

Chancery Division.

Mr. Justice

In the matter of the shares of *A. T.* and *B. T.*, both infants, in the freehold and copyhold lands in the parishes of *H.* and *E.*, in county of *D.*, forming part of the partnership estate of the late firm of

And in the matter of the Settled Land Act, 1882.

Let all parties [*&c., as in Form 70, above*] on the hearing of an application on the part of the above-named *A. T.* and *B. T.*, of , by *M. T.*, of , their next friend.

1. That the said *M. T.* and *G. H.*, of , may be appointed trustees [*&c., as in Form 70, par. 1*].

2. That the powers conferred on a tenant for life by sects. 6 to 13 (both inclusive), and sects. 19 and 20 of the said Act may be exercised by the said *M. T.* and *G. H.* on behalf of the said *A. T.* and *B. T.* respectively during their respective minorities.

3. [*Costs*].

Dated, &c.

[*Conclude as in Form 70.*]

(a) This was the form used in *Re Wells*, 48 L. T. Rep. N. S. 189; W. N., 1883. p. 111, but it would be better now that the title should follow Form 70, *ante*, p. 422.

75. SUMMONS BY QUASI-TENANT FOR LIFE FOR LEAVE TO EXERCISE THE POWERS OF S. L. A., 1882, s. 63.

In the High Court of Justice,
Chancery Division.
Mr. Justice

In the matter of the Dale estate, situated in the county of X., settled or deemed to be settled by an indenture dated the day of , 18 , and made between [*parties*].

And in the matter of the Settled Land Acts, 1882, 1884.

Let all parties [*&c., as in Form 66, above*] on the hearing of an application on the part of *A. B.*, the tenant for life, or the person who is deemed tenant for life, under the above-mentioned settlement.

1. That the court may give leave to the said *A. B.* to exercise with regard to the land comprised in the said settlement all the powers conferred by sect. 63 of the Settled Land Act, 1882.

3. [*Costs as in Form 66.*]

Dated, &c.

[If there are any trustees to be served conclude as in Form 66, otherwise conclude as in Form 70.]

76. SUMMONS BY TENANT BY THE CURTESY FOR APPOINTMENT OF TRUSTEES OF THE SETTLEMENT.

In the High Court of Justice,
Chancery Division.
Mr. Justice

In the matter of a house and appurtenances, situate in the parish of X. and the county of Y., settled by a settlement within the meaning of the Settled Land Act, 1884, s. 8, by *Elizabeth B.*, deceased, the late wife of *A. B.*

And in the matter of the Settled Land Acts, 1882, 1884. (*a*)

Let all parties [*&c., as in Form 66, above*] on the hearing of an application on the part of *A. B.*, of , the tenant by the curtesy, under the above-mentioned settlement.

1. That *G. H.*, of, &c., and *I. J.*, of, &c., may be appointed trustees of and under the above-mentioned settlement deemed to be existing for the purposes of the above Acts.

2. [*Costs as in Form 66, p. 418.*]

Dated, &c.

[*Conclude as in Form, 70, p. 422.*]

(*a*) According to the direction as to the titles to Originating Summons, *ante*, p. 332, it would be sufficient to entitle this summons in the Act of 1884 alone.

77. SUMMONS BY RECTOR FOR APPLICATION AND INVESTMENT OF MONEY PAID IN BY A SANITARY AUTHORITY IN RESPECT OF GLEBE LANDS TAKEN UNDER THE PUBLIC HEALTH ACT, 1875, IN IMPROVEMENTS AND REDEMPTION OF LAND TAX. (a)

In the High Court of Justice,
Chancery Division.

Mr. Justice .

Ex parte the Rector of X. in the county of Y.

And in the matter of the Public Health Act, 1875.

And in the matter of the L. C. C. Act, 1845.

And in the matter of the Settled Land Act, 1882.

Let the [sanitary authority] and *C. D. (b)* [*the patron of the living*] attend at the chambers of the Honourable Mr. Justice , at the Royal Courts of Justice, Strand, Middlesex, at the time specified in the margin hereof.

On the hearing of an application by the Rev. A. B., rector of X. in the county of Y., that—

(1.) The following improvement, viz. [*here describe the improvement*] be approved as a proper mode of investment or application of the sum of 200*l.* to be produced by sale of a competent part of the sum of 250*l.* Consolidated 3*l.* per Cent. Annuities now standing to the credit of "*Ex parte* the [sanitary authority] in the matter of the Public Health Act, 1875, in respect of the lands, part of the glebe of X. in the county of Y. belonging to the Rev. A. B. as tenant for life without power of sale." (*c*)

(2.) That redemption of land tax on the rectory house of X. and the garden belonging thereto, which form part of the glebe, and on the glebe land near thereto in the occupation of one F., which said premises contain in the whole about acres, and which are more particularly described in the affidavit in this matter dated, &c., of the said A. B., be approved as a proper mode of investment of a competent part of the said sum of 3*l.* per cent. annuities standing to the said credit. (*d*)

(3.) That on the production to the chief clerk of a certificate of E. F., of , surveyor, or in default of him of some surveyor appointed or approved by the Land Commissioners, or, in case they decline to appoint or approve, by the Bishop of Y. for the time being, that the said improvement has been properly performed, and of the reasonable cost of the same, a competent part of the said 3*l.* per cent. Annuities be sold (without deducting the brokerage,

(a) In this case a previous order had been made for interim investment in consols.

(b) The patron of a benefice is in much the same position as the remainderman of settled land, with regard to applications of this description.

(c) The title of the account will be copied *verbatim*. A rector or vicar is a corporation sole.

(d) Previous leave may be given to contract for redemption of land tax: (Seton, 1426.)

the said *A. B.* undertaking by his solicitor to pay the same to the Chancery broker), and that the reasonable cost, or the sum of 200*l.* (whichever be the less sum) be paid to the said *A. B.* out of the proceeds of such sale. (*a*)

(4.) That on completion of a contract by the said *A. B.* for the redemption of land tax on the said lands, and upon the requisition of the Receiver-General of the Inland Revenue, a competent part of the said 3*l.* per cent. Annuities be sold (without deducting the brokerage, the said *A. B.* undertaking to pay the same to the Chancery broker), and the cash produced be transferred to the account of the public moneys of the Receiver-General of Inland Revenue as the consideration for the redemption of the land tax charged on the said lands. (*b*)

(5.) That interest on the residue of the said 3*l.* per cent. Annuities may from time to time be paid to the said *A. B.* as rector of *X.* and his successors, rectors of *X.* for the time being, until further order.

(6.) That pursuant to the 80th section of the L. C. C. Act, 1845, and the 32nd section of the S. L. A. 1882, the said [sanitary authority] may be ordered to pay to the said *A. B.* his costs as thereby provided, including therein all reasonable charges and expenses of and incident to the said investments or application in the said improvement and redemption of land tax, and of this application, and of all proceedings relating thereto, such costs, charges, and expenses to be taxed in case the parties differ.

(7.) Or that such order may be made in the premises as may seem meet.

Dated the day of 18 .

[*Conclude as in Form 66, ante, p. 418.*]

(*a*) It is believed that the Land Commissioners do appoint surveyors, but the name of the bishop is added in case they refuse. It is usually more convenient to make a contract with some builder, or other person, to execute the improvement for a definite sum, but in some cases (as in the present instance) that was not found practicable. The money is not usually paid out until the work is complete.

(*b*) See Seton, vol. 2, part 2, p. 1425; vol. 1, p. 97. This is the usual and best mode of redeeming *small* sums. Roughly speaking, the cost of redeeming land tax was thirty years' purchase, before the conversion of stocks. Every information about redemption may be obtained at the land tax office at Somerset House (Room 73). At present, there is a question whether the price will not be raised to nearly thirty-three years purchase. Inquiry should be made before applying to redeem.

77a. *Variation where it is believed that the Fund in Court will be nearly spent. (a)*

(5.) That if by means of the above investments, and the orders made on this summons, the said 3l. per cent Annuities shall be reduced to 30l. or any less sum, the same be sold and (without deducting brokerage, &c., *as in par. 4, page 427*) paid to the said A. B., he undertaking, if the sum exceed 20l., to apply the same on such improvements on the glebe as are sanctioned by the Settled Land Act, 1882; but that if the said annuities be not reduced to 30l., that interest to accrue on the residue thereof may from time to time [*&c., as in par. 5 of the last preceding Form*].

(a) This is intended in substitution for paragraph 5 of Form 77, when circumstances render it suitable. Small balances are paid over to a tenant for life, or the incumbent of an ecclesiastical benefice. If this variation is employed, the words "AND PAYMENT OUT IF PAYMENT OUT IS ORDERED" must be added after the word TAX in line 6 of paragraph 6.

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